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Board submit on points & brief for
Ap- in error

SUPREME COURT OF THE UNITED STATES.

No. ~~211.~~ 130.

SAMUEL VERDEN, Pl'ff in Error,

vs.

ISAAC COLEMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

GIDEON, Printer.

Injunc not dissolved; The question does not arise
no jurisdiction
mortgage-sales of

609

SUPREME COURT OF THE UNITED STATES.

No. 211.

SAMUEL VERDEN, Pl'ff in Error,

vs.

ISAAC COLEMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

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PLEAS before the Honorable James L. Worden, James M. Hanna, Samuel E. Perkins, and Andrew Davison, Judges of the Supreme Court of the State of Indiana, held at the state-house in the city of Indianapolis, on the twenty-sixth day of June, in the year of our Lord one thousand eight hundred and fifty-eight.

SAMUEL VERDEN, Appellant,
vs.
ISAAC COLEMAN, Appellee. } Appeal from the Benton Circuit Ct.

Be it remembered, that heretofore, to wit, on the twenty-ninth day of May, in the year eighteen hundred and fifty-six, came the appellant, by Mace and Willson, his attorneys, and filed in the clerk's office of the Supreme Court a transcript of the record of the proceedings in the Benton Circuit Court, in the above entitled cause, which said record is in the words and figures following, to wit:—

(Transcript.)

State of Indiana, Benton County, *ss.*

Pleas began and held at the court-house in the town of Oxford, in said county, on the 10th day of March, A. D. 1856, it being the second Monday of said month, before the Hon. Andrew Ingram, Judge of the Benton Circuit Court, in the State of Indiana.

(Complaint.)

ISAAC COLEMAN
vs.
SAMUEL VERDEN. } Complaint to foreclose mortgage, $3134 86.

Comes now the plaintiff, by J. R. M. Bryant and Z. Baird, his attorneys, and files the following complaint in this behalf, to wit:—

State of Indiana, Benton County, *ss.*

In the Benton Cir. Court, of the March Term thereof, 1856. Isaac Coleman *v.* Samuel Verden. Complaint to foreclose mortgage.

The plaintiff complains of the defendant, and says that the defendant, on the 10th day of April, 1850, executed to the plaintiff the promissory note and mortgage, copies of which are filed herewith, and marked, the former A, the latter B, and read in the words and figures following, to wit:—

(Note.)

$2315. Attica, April 10, 1850.

One year from this date I promise to pay Isaac Coleman, or order, two thousand three hundred and fifteen dollars, without relief from valuation or appraisement laws, for value received.

SAMUEL VERDEN.

(Mortgage.)

This indenture, made this tenth day of April, A. D. eighteen hundred and fifty, between Samuel Verden, of the county of Tippecanoe, Indiana, of the first part, and Isaac Coleman, of the county of Fountain, and State aforesaid, of the second part, witnesseth: That the said party of the first part, for and in consideration of one dollar, lawful money of the United States, by the said party of the first part in hand duly paid, the receipt whereof is hereby duly confessed and acknowledged by and on the part of the said party of the first part, has and by these presents do grant, bargain, sell and convey unto the said party of the second part, his heirs or assigns, all the following described piece or parcel of land, to wit: The east half of the southeast quarter of section thirty-six, in township twenty-six, north of range ten west; the southwest fractional quarter of section thirty-one, township twenty-six, north of range nine west; the east half of the northeast quarter of section one, in township twenty-five, north of range ten west: the north half of the northwest quarter of section six, in township twenty-five, north of range nine west; the northeast quarter of the southwest quarter of section thirty-six, in township twenty-six, north of range ten west; and the west half of the northeast quarter of section number one, in township twenty-five, north of range ten west: containing in all three hundred and fifty-nine and sixty-one hundredths of an acre, together with all and singular the hereditaments and appurtenances to the same belonging or in anywise appertaining: To have and to hold the same unto the said party of the second part, his heirs and assigns, forever. Provided nevertheless, and these presents are upon this express condition, that if the said party of the first part shall well and truly pay or cause to be paid unto the party of the second part, his executors, administrators or assigns, the just and full sum of two thousand three hundred and fifteen dollars, in one year from this date, with interest from date, as evidenced by a promissory note of this date, then these presents shall be null and void. But in case of the non-payment of the said sum of money at the time above specified, or of the interest thereof, or any part of such principal or interest, then and in such case, it shall and may be lawful, and the said party of the second part, his heirs, executors, administrators or assigns, is hereby expressly authorized and empowered by the said party of the first part to sell the premises and lands hereinbefore described, at public auction or vendue, to the highest bidder therefor, after having given legal notice of such sale by advertising the same for the time and in the manner as provided by statute, and upon such sale to make, execute, acknowledge and deliver to the purchaser or purchasers, and his, her or their heirs or assigns, a good and sufficient deed or deeds in law, to transfer, convey, warrant and defend unto the said purchaser or purchasers, his, her or their heirs or assigns, the fee-simple of the said premises, rendering the overplus (if any)

there shall be, after paying the principal and interest which may then be due on this mortgage and the costs and expenses of said sale, unto the said party of the first his heirs, executors, administrators or assigns; or the said party of the second part, his executors or administrators, may proceed by bill in chancery, and foreclose this mortgage for any default herein.

In witness whereof the said grantor has set his hand and seal on the day and year first above written.

SAMUEL VERDEN. [SEAL.]

Signed, sealed, and delivered in the presence of
DANIEL MACE.

State of Indiana, Fountain County, *sct.*

Be it remembered that on this tenth day of April, A. D. 1850, personally came before me the undersigned, a notary public of said county, Samuel Verden, to me well known as the same person described in and who executed the foregoing deed of mortgage, and acknowledged the same to be his voluntary act and deed, for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and [SEAL.] official seal, this tenth day of April, 1850.

DAVIS NEWELL.

Recorded June 29th, 1850. HARTLEY T. HOWARD,
Recorder B. C.

A true copy. HARTLEY T. HOWARD,
Fee $1. Recorder Benton County.

Whereby he conveyed to the plaintiff the lands described in said mortgage, to secure the sum of money specified in said note. The plaintiff further says, that when the said note was executed, it was the intention of the parties that it should bear interest from its date, which was omitted by mistake or inadvertence to be expressed therein; wherefore the plaintiff asks judgment for four thousand dollars and the foreclosure of the mortgage and sale of the mortgage property, or so much thereof as may be necessary to pay his debt, without relief from valuation or appraisement laws, and for other proper relief.

J. R. M. BRYANT,
ZEB. BAIRD,
Att'ys for Plaintiff.

(Appearance of Defendant.)

And thereupon comes the defendant and waives the issuance and service of process in this behalf, and files his answer to said complaint as follows, to wit:—

(Answer.)

State of Indiana, Benton County, *ss.*

In the Benton Circuit Court, of the March term thereof, 1856. Samuel Verden ads. Isaac Coleman. Complaint to foreclose a mortgage.

The defendant, for answer to said complaint says, that on or about the date of said mortgage and note, he *he* purchased from one Samuel Coleman and said Isaac Coleman the following described lands, to wit: The east half of the southeast quarter of section thirty-six, in township twenty-six, north of range ten west; the southwest fractional quarter of section thirty-one, township twenty-six, north of range nine west; the east half of the northeast quarter of section one, in township twenty-five, north of range ten west; the north half of the northwest quarter of section six, in township twenty-five, north of range nine west; and the northeast quarter of the southwest quarter of section thirty-six, in township twenty-six, north of range ten west, all situated and being in the said county of Benton; that at the time of said purchase, one Isaac N. Banta held the legal title to said lands, in trust for said Colemans, and that he at the proper instance and request of said Colemans, made a deed therefor to this defendant; that at the same time, this defendant also purchased from said Colemans the following other lands, to wit: The west half of the northeast quarter of section number one, in township number twenty-five, north of range number ten west, situated, lying, and being in the county aforesaid; which said last mentioned tract of land was at the time conveyed to your orator by the plaintiffs; that the consideration for which said lands were sold and conveyed as aforesaid was the sum of four thousand three hundred and fifteen dollars; that the defendant at the time paid cash down the sum of two thousand dollars, and gave his promissory note for the sum of two thousand three hundred and fifteen dollars, payable to said Isaac Coleman; which note bears date of the day of said sale, and is payable one year after date, and should be with interest from date. This defendant admits the execution of the note and mortgage, copies whereof are made parts of the complaint, for the purposes and at the time specified in the complaint. The defendant further answering says, that a part of said lands so sold as aforesaid, and for which said two thousand dollars were paid and said note given, to wit: The northwest fractional quarter of section thirty-one, in township twenty-six, north of range nine west, was patented by the United States to Hannamah Hewett, on the 10th day of August, 1841, a copy of which patent is filed as a part of this answer, marked A, and reads as follows, to wit:—

(Hewett's Patent.)

Preëmption Certificate, No. 33,776.

The United States of America to all to whom these presents shall come, greeting: Whereas, Hanmah Hewett, of Benton County, Indiana, has deposited in the general land office of the United States a certificate of the register of the land office at Crawfordsville, whereby it appears that full payment has been made by the said Hannamah Hewett according to the provisions of an act of Congress of the 24th of April, 1820, entitled An act making further provisions for the sale of the public lands, for the southwest fractional quarter of section thirty-one, in township twenty-six, north of range nine west, in the district of lands subject to sale at Crawfordsville, Indiana, containing eighty-two acres and sixty-nine hundredths of an acre, according to the official plat of the survey of the said lands, returned to the general land office by the surveyor-general, which said tract has been purchased by the said Hannamah Hewett: Now know ye, that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted and by these presents do give and grant unto the said Hannamah Hewett and to his heirs, the said tract above described, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Hannamah Hewett, and to his heirs and assigns forever.

In testimony whereof, I, John Tyler, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office hereunto affixed.

Given under my hand, at the city of Washington, the tenth of August, in the year of our Lord one thousand eight hundred and forty-one, and of the Independence of the United States the sixty-sixth.

[SEAL.] By the President, JOHN TYLER.
By R. TYLER, Sect'y.

JOSEPH WILSON,
Acting Recorder of the General Land Office ad interim.

Recorded, vol. 68, page 452.

(Answer resumed.)

The defendant avers that said Banta and Colemans claim title to said last named land through said Hewett, and in no other way; that they, nor either of them, ever had or pretended to have, any title or interest in said land only by and through said Hewett, he claiming wholly by virtue of said patent; that said last named land is of great value, being in a small grove in the midst of the Grand Prairie, where timber and water are quite, if not very scarce; that it is well timbered, and water running through it; that without it the other

tracts of land, conveyed as aforesaid, are not worth more than the thousand dollars paid down as aforesaid; and that the said Banta and said Coleman, nor either of them, had any title to said lands at the time they were sold and conveyed as aforesaid; nor have they, nor either of them, had any title to said land last named, or any part thereof, since said sale; that, therefore, the consideration of said note has wholly failed, or rather there never was any consideration therefor.

The defendant further avers, that the deed made to him by the said Banta, and the said deed made to him by the said Isaac Coleman, and the note and mortgage aforesaid, executed by your orator to Isaac Coleman, were all made, executed, and delivered, with the full knowledge, consent, and approbation of said Isaac Coleman, Samuel Coleman, and Isaac Banta; and that the contract for said lands, and all of them, was an entire contract, although separate conveyances were made as aforesaid. In order to show that said Banta and Colemans never had any title to said lands, this defendant shows and charges, that in the year 1832, about the 27th October of that year, the United States of America made and concluded a treaty of purchase with the Pottowattomie Indians, of a large tract of country, including the last named tract of land, by the terms of which treaty, amongst other reserves, one section of land was reserved to an Indian named To-pen-na-be, to be located under the direction of the President of the United States; that after said treaty was made and concluded, and long before the date of said Hewett's patent, the President of the United States appointed Douglass to locate and set apart the reserved tracts of land to the persons named in said treaty; that, by virtue of said appointment, said Douglass entered upon the discharge of his duty, and made a report of his doings to the proper government department at the city of Washington, on the 20th January, 1836, which report was duly approved by the President of the United States, Martin Van Buren, on the 29th March, 1837. Said report, approval, certificate of Commissioner of Indian Affairs, and certificate and seal of the Secretary of the Interior, is made a part of this answer, and marked H, and reads in the words and figures following, to wit:—

(Report of J. T. Douglass.)

Washington, 20th January, 1836.

Hon. C. A. Harris. Sir: I have the honor to report the following selections for persons entitled to land under the treaty 27th October, 1832. For old We-saw, E. ½ section 23, T. 36, R. 8 W., 2d meridian. In obedience to your order of above date, I have selected for Wis-no-qui section 14, T. 32, R. 4 E., & sec. 10, T. 32, R. 4. These 3 selections are in lieu of sections 10, 11, 14, in town. 33, R. 6 E., rejected because they were located in Wis-qui-qua Buck's reservation out of treaty 1832. To To-pen-na-ba, sect. 31, T. 26, R. 9 west, for M. A. Bruner, Lots No. 184, sec. 31, T. 37, R. 7 W.; for

Chops S. Tuck. alias John Payne, sec. 13, T. 32, R. 4 E.; Mog, sec. S. ½ sec. 27, T. 36, R. 10 east, 3d meridian Ills.

Respectfully, J. G. DOUGLASS.

(List of Reserves Located.)

List of reserves located under the treaty with the Pottawattomies of 1832, by Mr. J. G. Douglass, pursuant to instructions from the department. Reserves, We-saw, sec. 31, T. 36, R. 7 W., 2d m'd, State of Indiana, in lieu of section 32, T. 36, R. 6 W., covered by improvements. Saw-ga-na, sec. 5, T. 36, R. 8, 2 m'd, in lieu of 30, 36, 5 W. John B. Duchane, fract. sec. 19, T. 36, R. 7 W., 2d m'd, in lieu of 18, 36, 6 W. do. Francis Page, Jr., south ½ sec. 32, T. 37, R. 7 W., 2 m'd, in lieu of S. ½ 11, 33, 5 E. Children of Mary Locombe, N. ½ sec. 2, T. 33, R. 3 E., 2d m'd, in lieu of W. ½ 19, T. 36, R. 1 E. Mis-no-qui, sec. 10, T. 32, R. 4 W., 2d m'd, in lieu of first location, which was covered by improvements, and sec. 14, T. 32, R. 4, sec. 1, T. 36, R. 8 W., 2d m'd. The apo-turkey, sec. 34, T. 36, R. 7 W. Po-ka-kause, south part of northwest qr. lot No. 2, W. ½ of the S. W. ¼ or lot No. 3, S. E. ¼ of W. ½ section 31, township 37, R. 7 W., in lieu of N. ½ 32, 35, 5 W. Joe Berison, N. W. ¼ sec. 36, township 34, R. 1 E., 3d m'd, in lieu of S. E. ¼ section 6, T. 35, R. 5 W. James Burnet, section 13, township 35, R. 4 E., in lieu of section 27, township 33, R. 6 E. Tou-see-qua, wife of Joe Bailey, sec. 37, township 33, R. 3 E., in lieu of 33, 36, 14 E. Shaw-co-wah-tuck, E. ½ S. E. ¼, S. W. ¼ of S. E. ¼ of 27, 30, 12 E., approved since ascertained that there is no section thus designated. Aube-na-bee, section 17, township thirty-six, R. 7 W., in lieu of 35, 29, 5 E., which was approved but found to be of no value; do. section 8, township 37, R. 15 E., 3d m'd, Illinois. Ne-karr-deszander, S. W. ¼ section 32, township 36, 3 W., 2d m'd, Indiana, in lieu of N. W. ¼ 29, 36, 4 W. Ash-kam, fract. section 4, township 36, R. 9 W., Indiana, in lieu of 13, 31, 11 E.; do. fract. E. of the old Indian line, section 7, township 37, R. 15 E., 3d m'd, Illinois. Besiah, fract. section 36, township 37, R. 8 W., 2d m'd, Indiana, in lieu of first location fourth part section 6; township 36, R. 7 W., Indiana, lying south of old Indian boundary line, in lieu of S. ½ 34, 34, 6. Van atau mant, W. ½ section 26, township 33, R. 3 E., 2d m'd, Indiana, for S. W. ¼ lying E. of the treaty line of 1846; section 5, township 37, R. 15 E., 3d m'd, Illinois, in lieu of a full quarter. Pe-nem-chis, E. ½ section 36, township 32, R. 10 E., 3d m'd, Illinois, in lieu of E. ½ 8, 35, 4 W. Gonice, section 13, township 31, R. 13 E., 3d m'd, Illinois, in lieu of 18, 31, 14 E. J. B. Laclare or Battorte Laclare, So. ½ section 31, township 32, Range 11 E., 3d m'd, Illinois. The 5 daughters of Monee, section 31, township 36, Range 14 E., 3d m'd, Illinois, and section 32, township 36, Range 14 E., 3d m'd, Illinois. F. Besior, E. ½ section 24, township 31, Range 13 E., 3d m'd, Illinois, in lieu of W. ½ 17, 31, 4 E. Sawgret, W. ½ section 18, township 31, range 14 E., 2d m'd, Illinois, in lieu of W. ½ 4, 29, 12

E., app'd, but error in described the fract. Wameme, son of Woran, N. W. ¼ section 19, township 31, range 14 E., 3d m'd, Illinois. Wisoura, section 15, township 30, range 13 W., 3d m'd, Illinois. This is the same land which was designated and approved as the W. ½ 22, 30, 12 E., Illinois. Pebewan, W. ½ section 22, township 30, range 13 E., 3d m'd, Illinois. Charles Chandens, E. ½ sec. 7, township 29, range 13 E., 3d m'd, Illinois, designated and approved as E. ½ 9, 29, 12 E. Wabega, S. W. ¼ section 3, township 29, R. 13 W., 3d m'd, Illinois, approved under the designation of of S. W. ¼ of section 32, 9, 12 E. Mogsa, S. ½ section twenty-seven, township 36, range 14 E., 3d m'd, Illinois, in lieu of W. ½ 21, 35, 3 W., app'd but conflicting in the pre-emption rights, has by consent of the assignee of the reserve been relocated. Pierre Namaree's wife, section 10, township 29, range 13 W., 2d m'd, Illinois, designated and app'd as 13, 29, 12 E. To-pen-ne-ba, section 31, township 26, range 9 W., 2d m'd, Illinois, in lieu of 19, 36, 5 W. M. A. Briner, lots 1 and 4, section 3, township 37, range 7 W., 2d m'd, Illinois, in lieu of N. E. ¼ 9, 34, 5 W., app'd but condemned as of no value. Chop G. Tuck, or John Payne, section 13, township 32, range 4 E., 2d m'd, Illinois, in lieu of 23, 33, 5 W., do. do. Ronsan, N. W. ¼ section 26, township 33, range 4 E., Illinois. The location by the agents, but through mistake, was approved to N. E. ¼ 9, 35, 3 W., which should be reversed. The preceding locations of reservations are respectfully recommended to be submitted to the President for his approval.

Office of Indian Affairs, March 28th, 1857.

C. A. HARRIS, Clerk.

Respectfully submitted for the approval of the President.

J. R. POINSETT.

War Department, March 29th, 1837.

(Approval of President.)

Approved March 29, 1837. M. VAN BUREN.

(Certificates.)

I, Orlando Brown, Commissioner of Indian Affairs, do hereby certify that the above and foregoing are true copies from the original files in this office of Indian Affairs.

ORLANDO BROWN, Commissioner.

May 7th, 1850.

Department of the Interior, May 7th, 1850.

Be it known that Orlando Brown, who has signed the above certificate, is the Commissioner of Indian Affairs, and that to his attestations as such full faith and credit are and ought to be given.

In testimony whereof, I, Thomas Ewing, Secretary of the Department of the Interior of the United States, have hereunto set

my hand and caused the seal of the said department to be affixed on the 7th day of May, one thousand eight hundred and fifty.

[SEAL.] T. EWING.

(Answer resumed.)

By which said report and confirmation aforesaid it will be seen that the whole of said section thirty-one, in township twenty-six, north of range nine, including the land patented to said Hewett aforesaid, and sold and conveyed to this defendant as aforesaid, was set apart under said treaty, and in accordance with the terms thereof, to the said To-pen-na-be, to be held by him, his heirs and assigns, forever: all of which was duly recorded in the proper land and war departments at Washington City; which treaty and location under it, and approval by the President aforesaid, fully and completely vested the fee simple of, in, and to said last named section of land in the said To-pen-na-be, his title being full, complete, and perfect on the day the President approved said location, to wit, the 29th March, 1837. And your orator further shows, that on the plat of land furnished the land-officers at Crawfordsville, Indiana, being within the land district where said section of land is situated, the same was marked and is yet marked as a reserve to the said To-pen-na-be, and was never offered for sale by the United States. The defendant charges that no officer or officers of the United States had or could legally or lawfully have any power, authority, or jurisdiction over said section of land, to sell or dispose of the same or any part thereof to the said Hewett or any one else after said location and confirmation aforesaid; and that patent to said Hewett for a part of said section of land aforesaid is utterly void and of no effect whatever; that he, said Hewett, had no more right to purchase one-eighth of said section of land at the time he did, than any other person would now have the legal right to purchase from the United States the remainder of said reserved section. The defendant charges that the fee to the remainder of said land not sold, or rather attempted to be sold said Hewett, is not now in the United States of America, and has not been since the 29th of May, 1837; that if the United States had power to sell a portion of said land to Hewett in 1841, four years after said location aforesaid, she now has power and authority not only to sell the balance of said reserved section, but to sell and patent all the reserved land named in said report aforesaid, made by said J. T. Douglas and approved by the President. The defendants contend that such a position is at war with every principle of law, equity, common justice and moral right, and cannot be tolerated in a court of justice and equity. The defendant charges that the title so patented to said Hewett, passed immediately to the said To-pen-na-be from the United States of America on the 29th March, 1837, under said treaty and location, and that said To-pen-na-be, or his grantees, one of whom is now in possession of it, to wit, Edward C. Sumner, have the full,

legal, and perfect title in fee simple to the same and every part thereof. The defendant charges that it is not now nor never was pretended that the said Coleman and Banta, or either of them, ever had any title to said fractional quarter whatever, other than what they derived by and through said Hewett.

MACE & WILLSON, Att'ys for Verden.

And thereupon said plaintiff files his demurrer to said answer as follows, to wit:—

(Demurrer to Answer.)

ISAAC COLEMAN
vs.
SAMUEL VERDEN.

In the Benton Circuit Court, of the March Term, 185

Complaint to foreclose mortgage.

The plaintiff demurs to the answer of the defendant herein, and says that the same is not sufficient in law.

BAIRD, for Plaintiff.

(Overruled.)

And thereupon the court overrules said demurrer, and orders that the plaintiff reply to said answer.

And thereupon the plaintiff files the following reply to said answer, to wit:—

(Reply.)

State of Indiana, Benton County, *ss.*

In the Benton Circuit Court, of March term, 1856.

ISAAC COLEMAN
vs.
SAMUEL VERDEN.

Reply.

The plaintiff, for reply to the answer herein filed, says, that he admits the purchase, at the time mentioned in said answer, of the land therein described from this plaintiff and the said Samuel Coleman; that the legal title in fee to said land was in said Banta at the time, who shortly after said sale, at the instance of this plaintiff and the said Samuel Coleman, and in pursuance of said purchase, conveyed the same by deed in fee to the said defendant. This plaintiff further admits, that the defendant at the same time purchased from this plaintiff and the said Samuel Coleman the other lands described in said answer; that this plaintiff about the same time, by deed in fee, conveyed said other lands to said defendant. This plaintiff further admits, that the price at which said lands were so purchased, and the consideration for which they were so sold and

conveyed, is correctly and truly stated in said answer; he also admits the payment to him at the time of said purchase of two thousand dollars of the purchase-money, and that the remainder thereof was secured by the promissory note of the defendant payable to the plaintiff, which note is correctly in said complaint and answer. The said note is now in the possession of this plaintiff, and he asks leave to produce and prove the same as an exhibit and refer thereto as an exhibit, for greater certainty on the final hearing of this cause.

This plaintiff further admits the execution by said defendant to this plaintiff, for the purpose named in said complaint and answer, of the mortgage therein referred to, and that said mortgage contains the proviso and power of sale named in said complaint, and is in the usual form of a mortgage upon real estate. The said mortgage is now in the possession of this plaintiff, and he asks leave to produce and prove the same as an exhibit, and refer to as an exhibit for greater certainty on the final hearing of this cause.

This plaintiff, further replying, admits, that the deed so made to said defendant, and the note and mortgage so executed to this plaintiff, were all made, executed, and delivered with the full knowledge, consent, and approbation of the said Samuel Coleman, Isaac Banta, and of this plaintiff, and that the contract of purchase of said land was entire.

This plaintiff, further replying, says, that he admits that the southwest fractional quarter of section thirty-one, in township twenty-six, north of range nine west, is a part of the land so sold, and for which said two thousand dollars were paid, and said note executed, and that the same was originally patented by the United States of America to said Hewett at the time mentioned in said answer, and that exhibit marked A, and made a part of said bill of complaint, is the original patent so issued to said Hewett. He further admits, that said Banta and this plaintiff derived their title, which they conveyed to said defendant, wholly through said Hewett; but he expressly denies, that said Hewett's title thereto commenced or rests wholly upon said patent. But, on the contrary, he charges that, long anterior to the said location which is mentioned in said answer, and approval thereof by the President, and some time in the year 1832, after the said tract referred to in said answer, the said Hewett settled upon and cultivated a portion of said land described in said patent, and continued in the possession and cultivation of a part thereof, until after the passage and approval of the pre-emption law of the 19th June, 1834, and that said Hewett cultivated a part thereof in 1833, and that immediately after the passage and approval of said law, and before the expiration of two years from the of said act, the said Hewett made three several applications to the register of the Land Office at Crawfordsville, Indiana, to prove his claim as a pre-emption settler upon said lands, and to enter and pay for the same, which said application was refused by the register

for the reason that the township plots of the land in which said claim was located had not been received at said office.

This plaintiff, further replying, saith, that the said Hewett continued in the occupancy and possession of said land and the cultivation of a part thereof until in August, 1840, when he again made application to the register and receiver of said land office to prove his claim as a pre-emption settler upon said land, and to enter and pay for the same; and that the affidavit of the said Hewett, and of the witness by him then offered in support of the same, were then certified and approved by said receiver and register, and forwarded to the General Land Office, at Washington, for the further action of that department and the President of the United States; and that shortly after said evidence had been so filed in the General Land Office at Washington the original patent, which is made a part of said answer, was issued in pursuance of said evidence and application and by the authority of the United States of America to the said Hewett and in recognition of the rights of the said Hewett as a pre-emptioner; copies of the said original application of said Hewett, in pursuance of which said patent was issued, and of the evidence in support thereof from the General Land Office, duly certified, are herewith filed and marked Exhibit A, and made a part of this reply, and read in the words and figures following, to wit:—

(Exhibit A.)

Testimony.

Testimony of Hannamah Hewett, offered in support of his right of pre-emption to the S. W. fra. qr. of section 31, in town. 26, N. range 9 west, under the acts of the 22d June, 1838, and of first of June 1840, in the presence of the register and receiver of the Land Office at Crawfordsville, Indiana, on the 6th August, 1840. Samuel Williams, being of lawful age and duly sworn according to law, deposeth and says: That he has resided in the neighborhood of Hannamah Hewett, and been personally acquainted with him from the year 1833, and can state, from my own knowledge, that Mr. Hewett has resided upon and cultivated the southwest fractional quarter of section 31, township 26, north of range 9 west, in the district of lands subject to sale at Crawfordsville, Indiana, from that time to the present. That he has a dwelling-house on the same, and is a married man, and a housekeeper. That he also made an improvement and erected a dwelling-house on the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of 31, in township 26, north range 10 west, which he entered jointly with Augustus M. Bingham under the act of 22d June, 1838; and that there is no person other than Mr. Hewett's own family, is now, or has been, living upon or in possession of the said southwest fractional qr. of sec. 31, in town. 26, north of range 9 west, excepting that there has been an Indian reservation on the same; and further this deponent saith not. SAMUEL WILLIAMSON.

Sworn to and subscribed before me, the undersigned, a justice of the peace in and for the county of Montgomery, State of Indiana, this 6th day of August, 1840.

LEVERETT G. BOVIS, J. P. [SEAL.]

Bethuel P. Williamson, being of lawful age and duly sworn according to law, deposeth and saith, that he has lived in the neighborhood of Hannamah Hewett since the year 1833, and has been personally acquainted with the said Hewett since (the) said year 1833, and can testify from his own personal knowledge that Mr. Hewett has cultivated the southwest fractional quarter of section 31, in town. 26, N. range 9 west in the district of lands subject to sale at Crawfordsville, Indiana for the last seven years; that he has a dwelling-house on the same in which he has lived; and that the said Hewett has a wife and two children; that no other person, other than Mr. Hewett and his family, is now, or has been living on, or has been in possession of the said southwest fractional quarter of section 31, in township 26, N. range 9 west, excepting that there has been an Indian reservation on the same; further saith not.

BETHUEL P. WILLIAMSON.

Subscribed and sworn to before me, the undersigned, a justice of the peace in and for the county of Montgomery, State of Indiana, this 6th day of August, 1840.

LEVERETT G. BOVIS, J. P. [SEAL]

John Wesley B. Hewett, being of lawful age and duly sworn according to law, deposeth and saith that he went on to the public land with his father, Hannamah Hewett, in the year 1832, and that he assisted his father in making an improvement in said year on what is now the southwest fractional quarter of section 31, in township 26, N. range 9 west, in the district of lands subject to sale at Crawfordsville, Indiana; and that he has resided with his father ever since the year 1832, who has lived on said tract and cultivated land on said fractional quarter ever since the year 1832; and that no other person, other than the said Hannamah Hewett and his family, has lived upon or has made any improvement at any time on the said southwest fractional quarter of section 31, in township 26, N. range 9 west; and further saith not.

JOHN WESLEY B. HEWETT.

Subscribed and sworn to before me, the undersigned, a justice of the peace in and for the county of Montgomery, State of Indiana, this 6th day of August, 1840.

LEVERETT G. BOVIS, J. P. [SEAL]

We hereby certify that Samuel Williams, Bethuel P. Williams and John Wesley B. Hewett, the witnesses testifying in relation to the pre-emption right Hannamah Hewett, and named in the fore-

going testimony, are, so far as our knowledge extends, men of respectability and entitled to credit.

LEVERETT G. BOVIS, J. P.
EZEKIEL McCONNELL, Register.
MARK CRUME, Receiver.

Affidavit of Hannamah Hewett, under the acts of 22d June, 1838, and of the first of June, 1840, relative to his right of pre-emption to the southwest fractional quarter of section 31, township 26, N. range 9 west. I, Hannamah Hewett, of Kenton county (formerly constituting a part of the county of Jasper), in the State of Indiana, do solemnly swear, that I settled upon and cultivated a portion of the public lands in the district of Crawfordsville, Indiana, in the year 1832, and erected a dwelling-house thereon, in which I have resided, together with my family, ever since; that in the year following, I erected an additional building, which has been occupied by my family as a dwelling-house in connection with the other; that when the public lands in that region were surveyed in the year 1834, the line dividing ranges nine and ten, west of township twenty-six north, threw a portion of my improvement on the southwest fractional quarter of section thirty-one, in township twenty-six N. of range nine west, and a portion on the east half of the southeast quarter of section thirty-six, in township twenty-six, north of range ten west, both of which tracts I have cultivated from that time to the present; that I was then and still am a housekeeper (having a wife and two children), and in possession, by personal residence thereon, of the said southwest fractional quarter of section 31, in township 26, N. range 9 west; that I entered upon the same in my own right, and exclusively for my own use and benefit; and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatever, by which the title which I might acquire from the government of the United States, should enure to the use or benefit of any one except myself, or to convey or transfer the said land, or the title which I may acquire to the same, to any other person or persons whatever at any subsequent time; and that no other person has any right or pre-emption thereto, to the best of my knowledge and belief, and I claim the right of pre-emption to said tract under the acts of the 22d June, 1838, and of the 1st June, 1840. HANNAMAH HEWETT.

Subscribed and sworn to before me, the undersigned, a justice of the peace in and for the county of Montgomery, State of Indiana, this 6th day of August, A. D. 1840.

LEVERETT G. BOVIS, J. P. [SEAL.]

(Letter of Com'r of Indian Affairs.)

War Department, Office of Indian Affairs, 26th April, 1839.

Sir: With reference to a communication of 7 September, 1838, from your office, in relation to the claim of Hannamah Hewett, to

the W. ½ of S. W. ¼ section 31, in township 26 N., of range 9 west, I inform you, that on the recommendation of this office, after a careful examination of the subject, the location for To-pen-na-bee, so far as it covers the W. ½ S. W. ¼ of the tract above designated, has been set aside by the Secretary of War. The papers inclosed were received informally from your office, and, as they relate to the case in question, are returned herewith.

Very respectfully your mo. ob't serv'ts,

D. KURTZ, Acting Com'r.

JAMES WHITCOMB, Esq.,
Commissioner Gen'l Land Office.

(Letter of Secretary of Treasury.)

Treasury Department, August 28th, 1835.

Sir: A copy of a letter addressed to the President upon the subject of locations made under the Pottawattomie Treaty, which will interfere with claims under the pre-emption acts of June, 1834, and the improvements of the settlers, together with the decision of the President on the questions submitted, is herewith enclosed. You will instruct the Land Office accordingly. It is understood to be the intention of the War Department to confer with the Land Office, before any floating locations under the treaty are finally approved, with a view to correct any errors.

I am, very respectfully, your ob't serv't,

LEVI WOODBURY,
Secretary of the Treasury.

Commissioner of the General Land Office.

P. S. Depositions in the case of Pirrie & Motton, and a list of pre-emption claims which conflict with the locations under the treaty, all herewith enclosed.

(Copy.)

(Letter of Secretary of Treasury.)

Treasury Department, Aug. 27th, 1835.

Sir: In reference to the within list of pre-emption claims in La Porte Land District, upon which reservations under the treaty with the Pottawattomies, approved the 21st of January, 1833, have been located, I have the honor to observe, that by the instructions from this department, dated the 23d of May last, the Register of the Land Office at La Porte was informed that it had been decided with your approbation, that persons holding floating rights of entry under treaty stipulations, were entitled to a preference over those claiming a right of entry under the provisions of the pre-emption act of the 19th of June, 1834. In making this communication, I was governed by the principle assumed in the execution of the treaty with the Choctaws, concluded at Dancing Rabbit Creek.

going testimony, are, so far as our knowledge extends, men of respectability and entitled to credit.

LEVERETT G. BOVIS, J. P.
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Subscribed and sworn to before me, the undersigned, a justice of the peace in and for the county of Montgomery, State of Indiana, this 6th day of August, A. D. 1840.

LEVERETT G. BOVIS, J. P. [SEAL.]

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I am, very respectfully, your ob't serv't,

LEVI WOODBURY,
Secretary of the Treasury.

Commissioner of the General Land Office.

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By the provisions of the treaty with the Pottawattomies, reservations not specially described, shall be located under your direction. Accordingly, in the instructions from the War Department, the locating agent was directed to locate the following reservations upon lands of "*average value for agricultural purposes, neither the best nor the worst, but such as are of a just medium.*"

It nevertheless appears that, instead of satisfying the reservations of the treaty with lands of medium quality and value, the agent has, in numerous instances, selected lands upon which pre-emption claims have been laid and admitted, and which have derived increased value from the value and improvements of the bona fide settler. Under these circumstances, I would respectfully submit for your consideration, whether it would not be proper to withhold your sanction from such locations, not specifically defined in the treaty, as may interfere with settlers whose rights have been recognized, and who have consequently been permitted to purchase the lands occupied by them; that the land officers be so advised, and the agent be directed to locate the undefined reservations of the treaty in strict conformity with the instructions of the War Department.

Understanding that there is a number of settlers having extensive improvements, who do not come within the provisions of the pre-emption laws, but who are waiting the approach of the public sales, to compete for the purchase of the same, I would also submit for your decision, whether the improvements of such persons should not be exempted from location under treaty reservations.

I have the honor to be, very respect., your ob't serv't,

LEVI WOODBURY,
Secretary of the Treasury.

(President's Approval.)

To the President of the United States:

The above suggestions are approved, and requested to be carried into effect. ANDREW JACKSON.

August 29th, 1835.

General Land Office, May 19th, 1851.

I, Justin Butterfield, Commissioner of the General Land Office, do hereby certify, that the foregoing five pages, and the portion of this, the sixth page, which precedes this certificate, are truly copied from the files of this office.

In testimony whereof, I have hereunto set my hand, and caused to be affixed the seal of the General Land Office, the day and year last above written.

[SEAL.] J. BUTTERFIELD, Com'r.

(Reply Resumed.)

This plaintiff further replying, saith, that he admits that the United States of America, about the time alleged in said answer,

made and concluded a treaty with the Pottawattomie Indians, by which the chief and warriors of said Indians ceded to the United States of America a large tract of country, but that he denies that by the terms of said treaty a section of land so ceded was reserved to the said To-pen-na-be—but he admits the United States did, in and by said treaty, agree to patent to said To-pen-na-be one section of land, not agreeing that the same should be granted to him out of the lands ceded, but only agreeing that the same should be conveyed to said To-pen-na-be by patent, and which was to be located under the directions of the President of the United States. This plaintiff admits the appointment by the President, after said treaty, of the said J. T. Douglass to locate said land, also the entry of said Douglass, in pursuance of said appointment upon the discharge of his duties, the report by him made, which is made a part of said answer, and the approval thereof by the President.

This plaintiff further replying, denies that the report and approval vested any title in said To-pen-na-be, in said land so set apart to him, but insists that the same remained subject to the control of the President until a patent should issue in pursuance of such location.

This plaintiff further replying says, that the said Douglass and the said To-pen-na-be at the time said location was so made well knew of the existing equitable title to said land of the said Hewett, but that the President approved said location inadvertently and without knowledge of the said Hewett's title.

This plaintiff further replying says, that the said Douglass in making said location acted in direct violation of the orders issued to him from the Treasury Department under the sanction of the President, a duly certified copy of which said orders from the treasury department is to be found among the papers contained in exhibit A, and is above made a part of this reply.

This plaintiff further replying says, that in 1838, the receiver and register of the land office at Crawfordsville notified the General Land Office of the claim which had previously, as above stated, been made to them by said Hewett, as a pre-emption to said lands described in (in) said patent, and evidence was then forwarded to said department of said claim, and testimony to support the same. Notice whereof was then given by the General Land Office to the War Department, by which latter department, under the direction of the President of the United States, the matter was referred to the Commissioner of Indian Affairs, to examine said evidence and report upon the validity of the claim of said Hewett, and upon the propriety of said location —which said commissioner made a report in the premises to said department on the 20th April, 1839, and which report was duly concurred in by Joel R. Poinsett, the then secretary of war, on the 24th April, 1839; a copy of said report and of the said approval duly certified, and the authentications thereto appended, are herewith filed, marked exhibit B, and made a part of this reply, and read in the words and figures following, to wit:—

(Copy).

(Letter of T. H. Crawford.)

War Department, Office Indian Affairs,
20th April, 1839.

Sir: By the 3d article of the treaty of 27 October, 1832, with the Pottawattomies, there is reserved to To-pen-na-bee, principal chief, "one section of land, to be selected under the direction of the President of the United States." The selection was made on the 20th January, 1837, and was approved by the President on the 29th March, 1837. Of this location Hannamah Hewett claims eighty acres by virtue of a settlement and improvement thereon made in the winter of 1832. It appears that the Indian Chief was located on section 31, township 26, and range 9 west, second meridian, Indiana; and when it was submitted for the President's approval no evidence existed here that any portion of it was claimed adversely. On the 7th September, 1838, this office was first advised of the claims of Hewett, by a communication from the General Land Office, which covered testimony in support of his right, with a memorandum made at this office, "proof sufficient if made in time, but one of the tracts covered by an Indian float." Hewett states that he settled upon the W. ½ of S. W. ¼ of sec. 36, T. 26, R. 9 west, and the E. ½ S. E. ¼ of section 36, T. 26, R. 10, being contiguous tracts, in February, 1832, and put up a dwelling-house thereon, in which he has lived ever since. That he had about six acres of corn on said land on 19th June, 1834. In this statement he is confirmed by the deposition of Henry D. Bell, who further says that in surveying the said land, the line dividing the two tracts separate Hewett's house from his stables and some other improvements. John Nelson testifies to the same effect. By the law of 19th June, 1834, S. 1., it is enacted "That (any) every settler or occupant of the public lands, prior to the passage of this act, who is now in possession, and cultivated any portion thereof in the year one thousand eight hundred and thirty-three, shall be entitled to all the benefit and privileges provided by the act entitled, An act to grant pre-emption rights to settlers on the public lands," approved May 29, 1830. "And the said act is hereby revived, and shall continue in force two years from the passage of this act, and no longer." The second section provides "that when a person inhabits one quarter section and cultivates another, he shall be permitted to enter the one or the other at his discretion; provided, such occupant shall designate within six months from the passage of this act the quarter section of which he claims the pre-emption under the same." A report from the register and receiver at Crawfordsville, Indiana, dated 29th November 1838, states that Hewett made three several applications to the former register of said office to prove his claim under the pre-emption law of 1834, but was not permitted to do so in consequence of the township plats not having been returned

to the office while the law was in force. By said law he was entitled to a quarter section of land, with a fair and legal right thereto as soon as the law passed, and he did all in his power to have his right recognized.

On the 22d June, 1838, the pre-emption law above named was extended, and provided that settlers at its enactment and for four months next preceding, should be entitled to all the benefits of the law of 1830, which was revived for two years, providing that where there was more than one settler on a quarter section they should have it equally, but have no claim to any other land by virtue of said law of 1838. By the first section of law of 1830, a settler was authorized to enter with the register of the land office for the district in which such lands may lie, by legal subdivisions, any number of acres, not more than one hundred and sixty, on a quarter section, to include his improvements. This act was incorporated with the law of 1834, and would seem to entitle a party to take parts of two adjacent sections, restricting him only to take only by legal subdivisions. The second section of the law of 1834 may appear to conflict with such right, but the great object of that provision was probably to prevent a settler from asserting a right to detached parcels of land. This view is fortified by the seventh paragraph of Instructions to Registers and Receivers, issued by the General Land Office, on the 22d July, 1834, which is in these words: "Where an improvement is situate on different quarter sections the claimant is entitled to enter such two adjacent subdivisions (viz., the east and west half quarter) as will include his improvements," and also by the entry already referred to on the evidence in this very case, "proof sufficient if made in time, but one of the tracts covered by an Indian float." If the idea suggested be correct, Hewett's difficulty is made by time, and the conflicting location for the Indian Chief. As to the latter, it was made on the 20th January, 1837, and apparently directly in the face of instructions of 27th August, 1835, embodied in a communication from the secretary of the treasury to the President of the United States, and approved by him, which forbid the agent to locate for the Indians lands that were settled on and claimed under the pre-emption law, of which persons had settled themselves not entitled as pre-emptory, who were awaiting the approach of the public sales to compete for the purchase of the same. The location for To-pen-na-bee was approved by the President of the U. S. on 29th March, 1837. Hewett not being permitted to come under the law of 1834, was allowed to enter an eighth of a section, or 80 acres, under the law of 1838, out of section 36, T. 26, R. 10, there being another settler on the same quarter, which was divided between them. He now claims 80 acres more out 31, 26, 9, upon which is a part of his buildings and cleared lands, and which adjoins his other 80 acres, so that he can take both by "adjacent legal subdivisions." The approval of the President to the Indian location is the greatest difficulty, and would be regarded as inseparable were it not that,

heretofore, in a case approved on the same day, viz., that of Mary Ann Bruner, upon its being shown that the land located for her had been previously entered and paid for, the approval was reconsidered and reversed. Regarding this precedent as binding on me, it follows that if Hewett stands within the range of the reason that settled the Bruner case, the approval of the President will be regarded as made under misapprehension of the facts, and yield. He did not enter and pay for the land, but he offered to do so at three different times; it was owing to no neglect or fault of his that this was not done, his proposition was rejected by the land officers because they had not the township plats. Equitably he occupies precisely the same ground as if the entry and payment had been made, which he did everything he could to perfect. The delay was protracted until the law of 1834 expired by its own limitation. The circumstances of Hewett's entering 80 acres under the law of 1838 is no waiver of his present claim. It was reasonable to presume it was done either in the apprehension he might lose all, or because he was told truly that it was the only law under which an entry could be made then. It was a measure of prudence to disencumber as much of his land as he could of controversy. He was clearly entitled once to come in for what he now claims under the law of 1834. Can an order be made by which he shall have his *entry nunc pro tunc?* It would at first blush seem to be reasonable, but no powers are possessed by the executive, except those which the law confers. The one above referred to has ceased to operate, except as revived in the conditions by the law of 1838, and I think all power to perfect rights commenced under it is gone. I know of no authority short of an act of Congress which can give him what I conceive to be his just rights; for it would be a grievous hardship that a man who had built on and cultivated a farm so long ago as 1832 should be ousted by a floating right located in 1837, and that with full notice to the claimant, for his adversary's stables, and outhouses, and cleared land, were upon the very ground he claims. I do not doubt a law upon the proper representation will be passed for his relief. The location for To-pen-na-be, ought, it appears to me, to be set aside for the 80 acres of sec. 31, T. 26, R. 9. It was not only made in the face of another man's rights, but directly contrary to the instructions of the locating agent, who was directed not to locate any land for the Indians that were settled on and claimed under the pre-emption laws, or on which persons had settled themselves not entitled as pre-emptors who where awaiting the approach of the public sales to compete for the purchase of the same. Hewett claimed always under the pre-emption laws, and does now; and admitting he cannot be such at this day, he answers the other descriptions, and can buy at public sale. There is no merit in the claim under the To-pen-na-bee right. All the equity seems to me to belong to Hewett, and I therefore recommend that the Indian location, so far as it covers the

W. ½ S. W. ¼ of sec. 31, T. 26, R. 10 west, be set aside. This will open the door for Hewett, and enable him to take the necessary steps for obtaining the title to a small tract of land that he has been making more valuable every day for the last seven years.

Very respectfully, your most obedient servant,

T. HARTLEY CRAWFORD.

Hon. J. R. POINSETT, Secretary of War.

Upon the foregoing report is the following endorsement by the Secretary of War:

(Approval of Sec'y of War.)

"April 24, 1839." Report concurred in and approved.

J. R. P."

Department of the Interior,
Office of Indian Affairs, July 17th, 1851.

I, Charles E. Mix, acting Commissioner of Indian Affairs *ad interim*, do hereby certify that the foregoing is a true copy of the original on file in this office.

CHARLES E. MIX,
Acting Commissioner *ad interim*.

(Certificate.)

United States of America.

I, Alexander H. H. Stuart, Secretary of the interior, do hereby certify, that Charles E. Mix, whose signature is annexed to the foregoing certificate, is now and was at the time of signing the same, acting Commissioner of Indian Affairs *ad interim*, and that full faith and credit are due to his official acts as such.

In testimony whereof I have hereunto set my hand and caused the seal of said department to be affixed, this 17th day of July, 1851.

[SEAL.] ALEX. H. H. STUART.

(Reply resumed.)

This plaintiff expressly denies that it is true, as charged in said answer, that neither this plaintiff or said Banta had any title to said lands described in said patent when the same were so conveyed to said defendant; but on the contrary, he insists that by said conveyance said defendant received and became possessed of a sure and indefeasible title in fee simple of, in, and to said lands. This plaintiff denies that the said land described in said patent is of the value mentioned in said answer, but admits the same to be of the value of from 12 to 15 dollars an acre.

This plaintiff further replying, saith that he denies that said To-pen-na-bee or his grantees or his grantee, is now in possession of said land described in said patent, but on the contrary he charges that this plaintiff and the said Sumner were in possession of the said land

at the time of said purchase by said defendant, and that immediately after said purchase (said) Sumner was placed in possession of said land under said Verden and made the said title so conveyed to him. All which this plaintiff will aver, maintain, and prove, as this honorable court may direct, &c.

ISAAC COLEMAN,
J. R. M. BRYANT,
MARSHALL M. MILFORD,
Z. BARIS,
Sol's for Plaintiff.

And thereupon the defendant files the following demurrer to said reply, to wit:—

(Demurrer to Reply.)

VERDEN ads. COLEMAN.

The defendant demurs to the reply of said plaintiff and every paragraph thereof, and says that the same is not sufficient in law.

MACE & WILSON, Att'ys for Deft.

(Overruled.)

Which demurrer the court overrules, and adjudges said reply a sufficient reply to said answer. And thereupon this cause is submitted for trial to the court without the intervention of a jury, by consent of the parties; and thereupon the court finds that there is due from the defendant to the plaintiff on the said debt, secured by the said mortgage, the sum of three thousand one hundred and thirty-four dollars and eighty-six cents, and that said mortgaged lands are held and bound for the payment thereof. It is therefore considered, adjudged, and decreed by the court now here, that unless the said defendant within thirty days from the date of this judgment pay the said sum of three thousand one hundred and thirty-four dollars and eighty-six cents, with interest thereon from this date and the costs of this suit, the lands described in said mortgage, to wit: The east half of the southeast quarter of section thirty-six, in township twenty-six north, of range ten west; the southwest fractional quarter of section thirty-one, in township twenty-six north, of range nine west; the east half of the southeast quarter of section one, in township twenty-five north, of range ten west; the north half of the northwest quarter of section six, in township twenty-five north, of range nine west; the northeast quarter of the southwest quarter of section thirty-six, in township twenty-six north, of range ten west; and the west half of the northeast quarter of section number one, in township twenty-five north, of range ten west; be sold for the payment and satisfaction thereof, as other lands are sold on execution, and that upon such sale being made, the defendant be forever

barred and foreclosed of and from all his equity of redemption of, in, and to said lands.

And thereupon the defendant files the following bill of exceptions in this case, to wit:—

(Bill of Exceptions.)

The State of Indiana, Benton County, *ss.*

In the Benton Circuit Court of March Term, 1856.

Be it remembered, that the following was all the evidence given on the final hearing of said cause, to wit:—

The plaintiff introduced the original note and mortgage, copies whereof are made parts of this complaint. The defendant read in evidence the original patent from the United States, which is made a part of his answer; also duly authenticated copies of the report of the said J. T. Douglas, and approval thereof by the President, which are also made a part of his answer. The plaintiff then read in evidence the original deed from Hannamah Hewett to Lorenzo D. Hewett, and from Lorenzo D. Hewett to Isaac N. Banta, which reads as follows, to wit:—

(Deed from Hannamah Hewett and wife to Lorenzo D. Hewett.)

This indenture, made this twenty-third day of October, in the year of our Lord one thousand eight hundred and forty-one, between Hannamah Hewett and Elizabeth Hewett, his wife, of the county of Benton, and State of Indiana, of the first part, and Lorenzo D. Hewett, of the county and State aforesaid, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of two hundred and seventy dollars, lawful money to him in hand paid, the receipt whereof is hereby acknowledged, hath hereby given, grant, bargain, sell, and confirm unto the said party of the second part, his heirs and assigns forever, the following tract or parcel of land, situated, lying, and being in the county of Benton aforesaid, it being known and described as follows, to wit: southwest fractional quarter of section number 31, in township number 26 north, of range No. 9 west, containing 82 acres and 69 hundredths: To have and to hold the premises aforesaid, with all the rights, privileges, and appurtenances thereof unto the said party of the second part, his heirs and assigns, forever. And the said party of the first part for himself, his heirs and executors, covenants and agrees to and with the said party of the second part, his heirs and assigns, that he is lawfully seised of the premises aforesaid, and that they are free from all incumbrances, and the said premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the lawful claims and demands of all persons, the said party of the first part, and his heirs, executors and administrators will forever warrant and defend.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year above written.

HANNAMAH HEWETT, [SEAL.]
her
ELIZABETH X HEWETT. [SEAL.]
mark

Signed, sealed and delivered in the presence of
THOMAS MARTIN,
his
JAMES X MARTIN.
mark.

State of Indiana, Benton County, *set.*

Be it remembered, that on this day, to wit, the twenty-sixth day of October, A. D. 1841, before me, the undersigned, an acting Justice of the Peace in and for said county, personally (appeared) came the within-named Hannamah Hewett and Elizabeth, his wife, and severally acknowledged that they signed, sealed and delivered the within deed of conveyance for the use and purposes therein contained, and Elizabeth Hewett, wife of the said Hannamah Hewett, being me first examined separate and apart from her said husband, and the contents of said deed being by me made known to her, acknowledged that she signed, sealed and delivered the same as her own voluntary act, without any compulsion or coercion from her said husband.

In testimony I have hereunto set my hand and seal the day and year above written.

THOMAS MARTIN, JR. [SEAL.]

(Deed from Lorenzo D. Hewett to Isaac V. Banta.)

This indenture, made this ninth day of June, in the year of our Lord one thousand eight hundred and forty-three, between Lorenzo D. Hewett, of the county of Coles, and State of Illinois, of the first part, and Isaac V. Banta, of the county of Fountain, and State of Indiana, of the second part, witnesseth that the said party of the first part, for and in consideration of the sum of one thousand dollars, lawful money of the United States, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged by the said party of the first part, has granted, bargained, and sold, and by these presents do grant, bargain, sell and convey unto the said party of the second part, and his heirs and assigns forever, all the tracts or parcels of land lying and situate in the county of Benton and State of Indiana, and known as follows, to wit: the east half of the southeast quarter of section thirty-six, in township twenty-six north, of range ten west, containing eighty acres; also the southwest fractional quarter of section thirty-one, township twenty-six north, of range nine west, containing eighty-two acres and sixty-nine hundredths of an acre, in

the district of lands subject to sale at Crawfordsville, Indiana, together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof: To have and to hold the said premises, parcels or lots of land above particularly described, with the appurtenances aforesaid, to the sole and only benefit and behoof of the said party of the second part, his heirs and assigns, forever. And the said party of the first part, for himself, and his heirs, executors and administrators, do covenant and agree to and with the said party of the second part, his heirs and assigns, that he, the said party of the first part, is lawfully seised of the premises hereby conveyed as of a good, sure, perfect and absolute estate of inheritance in the law in fee simple; that the same are free and clear of all incumbrances whatsoever, and that he has good right to sell and convey the same in manner and form aforesaid; and further, that the said party of the first part, and his heirs, executors and administrators, shall and will warrant and forever defend the said party of the second part, his heirs and assigns, in the quiet and peaceable possession of the above granted premises against all and every person or persons whomsoever lawfully claiming or to claim the same, and every part and parcel thereof.

In testimony whereof, the said Lorenzo D. Hewett, party of the first part, has hereunto set his hand and affixed his seal the day and year first above written. LORENZO HEWETT. [SEAL.]

Signed, sealed, and delivered in presence of
JASPER ELDRIDGE,
ANDREW HIXON.

State of Indiana, Fountain County, *ss.*

Personally appeared before me the undersigned, Andrew Hixon, a Justice of the Peace of said county, Lorenzo D. Hewett, and acknowledged the deed of conveyance, to which this is annexed, to be his act and deed for the purposes herein mentioned.

Given under my hand and seal this ninth day of June, 1843.

ANDREW HIXON, [SEAL.]
Justice of the Peace.

(Bill of Exceptions.)

Also, duly authenticated copies of the application of said Hewett for a patent, and the evidence in support thereof, which are made a part of said reply, and marked Exhibit A. Also a copy of the report of T. Hartley Crawford, and approval thereof, duly authenticated, made a part of said reply, and marked Exhibit B; which was all the evidence given on the trial of said cause; upon which said evidence the court rendered the judgment and decree elsewhere in their record to be found; to the rendering of which judgment and decree the defendant at the time by his counsel excepted, and prays

that this his bill of exceptions may be signed and sealed by the court and made a part of the record herein, which is accordingly done.

A. INGRAM. [SEAL.]

And prays an appeal from the above judgment to the Supreme Court of this State, which is granted upon his filing bond in the penal sum of six thousand dollars, with Edward C. Sumner as surety therein, who is approved by the court, within thirty days from this date.

And now at this time, to wit, on the 22d day of March, 1856, comes the said defendant and files the following bond, to wit:—

(Appeal Bond.)

Know all men by these presents that we, Samuel Verden and Edward C. Sumner, are held and firmly bound unto Isaac Coleman in the penal sum of six thousand dollars, for the payment of which we bind ourselves, our heirs, executors and administrators firmly by these presents.

Signed with our hands and sealed with our seals, and dated this 22d day of March, 1856.

The condition of the above obligation is such, that whereas the above bound Samuel Verden has prayed an appeal (and it being granted by the court) to the Supreme Court of the State of Indiana from the judgment of the Benton Circuit Court in the State of Indiana, against him, the said Samuel Verden, and in favor of the said Isaac Coleman. Now if the said Samuel Verden will duly prosecute his appeal, and abide by and pay the judgment and costs which may be rendered or affirmed against him, then the above obligation is to be null and void, else to be and remain in full force and virtue in law.

E. C. SUMNER. [SEAL.]

(Certificate.)

State of Indiana, Benton County, *ss.*

I, Hartley T. Howard, Clerk of the Benton Circuit Court in the State of Indiana, do hereby certify that the above and foregoing is a full, true and complete transcript of the above entitled cause, as appears from the records of said court now remaining on file in my office.

In witness whereof I have hereunto subscribed my name, and affixed the seal of said court at office in Oxford, on this 5th day of April, 1856.

[SEAL.] HARTLEY T. HOWARD, Clerk.

And upon said transcript is the following assignment of errors, to wit:—

(Assignment of Errors.)

In Supreme Court. Appeal from Benton Circuit Court.

SAMUEL VERDEN
vs.
ISAAC COLEMAN.

The said appellant assigns the following cause of errors, to wit:—
1st. The court erred in not sustaining the demurrer to the reply.
2d. The court erred in rendering judgment for the plaintiff, when, from the record, judgment should have been for the defendant.

MACE & WILSON, for Appellant.

And also upon said transcript is the following joinder in error, to wit:—

(Joinder in Error.)

"There is no error in the foregoing record.

Z. BAIRD, for Appellee."

And afterwards, to wit, at a court began and held on the 26th day of May, 1856, and continued from day to day till the 22d of November, 1856, at which time came the appellant by his attorneys, and on his motion this cause is ordered to be continued till the next term of this court.

And afterwards, to wit, at a court began and held on the 24th of November, 1856, and continued from day to day till the 23d of May, 1857, at which time came the appellant by his attorneys, and on his motion this cause is ordered to be continued till the next term of this court.

(Submission.)

And afterwards, to wit, at a court began and held on the 25th of May, 1857, and continued from day to day till the 27th day of May, 1857, at which time came the parties by their attorneys, and the assignment of errors and answer thereto having been filed, by agreement of parties this cause is submitted to the court; but the court not being sufficiently advised in the premises, take time to advise thereon.

And afterwards, to wit, at a court began and held on the 25th of May, 1857, and continued from day to day till the 12th day of August, 1857, at which time came the parties by their attorneys; but the court, not being sufficiently advised in the premises, take time till the next term of this court to advise thereon.

And afterwards, to wit, at a court began and held on the 23d of November, 1857, and continued from day to day till the 22d of May,

1858, at which time came the parties by their attorneys; but the court, not being sufficiently advised in the premises, take time till the next term of this court to advise thereon.

And afterwards, to wit, at a court began and held on the 24th day of May, 1858, and continued from day to day till the thirtieth day of the term, being the twenty-sixth day of June, 1858, at which time came the parties by their attorneys, and the court being sufficiently advised in the premises, give the following opinion and judgment herein, per Curiam:—

(Opinion.)

The facts of this case, and the questions of law arising in the record before us, are precisely similar to those in a case between the same parties, decided at the November Term of this court, 1853. See Verden *v.* Coleman, 4 Ind. R., 457. Upon the authority of the case cited, the judgment in the present case must be affirmed.

The judgment is affirmed, with one per cent. damages and costs.

(Judgment.)

It is therefore considered by the court, that the judgment of the court below, be in all things affirmed at the costs of the appellant, with one per centum damages, on the amount of the judgment in said court. All which is ordered to be certified to said court.

And it is further considered by the court, that the appellee recover of the appellant, the sum of dollars and cents for his damages, as also the sum of dollars and cents for his costs and charges in this behalf expended.

And afterwards, to wit, on the 30th day of March, 1860, came the appellant, Samuel Verden, by Daniel Mace, his attorney, before the Honorable Andrew Davison, the Chief Justice of the Supreme Court of the State of Indiana, and sued out a writ of error to the Supreme Court of the United States, which writ is in the words and figures following, to wit:—

(Writ of Error.)

United States of America, *ss.*

The President of the United States, to the Honorable Andrew Davison, Chief Justice of the Supreme Court of the State of Indiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of said State, in which a decision could be had, in the said suit between Samuel Verden and Isaac Coleman, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under,

the United States; and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States; and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under the United States; and the decision was against the title, right, or privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Samuel Verden, as by his complaint appears: we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being (then) inspected, the said Supreme Court may cause further to be done therein, to correct that error, which of right and according to the law and custom of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court, the thirtieth day of March, in the year of our Lord one thousand eight hundred and sixty, and William B. Beach, Clerk of the Supreme Court of the State of Indiana, and the seal of said court hereto affixed, this 30th day of March, A. D. 1860.

[SEAL.] WM. B. BEACH, Cl'k S. C.

Writ of Error allowed.

ANDREW DAVISON,
Chief Justice of the Supreme Court of the State of Indiana.

And on the day and year aforesaid came the appellant, and filed his bond, citation, and affidavit in the words and figures following, to wit:—

(Citation.)

The United States of America, *ss.*

To Isaac Coleman, or Z. Baird, his attorney, greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States, to be holden at Washington city, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Indiana, wherein Samuel Verden is plaintiff in error, and you, Isaac Coleman, are defendant in error, to show cause, if any there be, why the judg-

ment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Andrew Davison, Chief Justice of the Supreme Court of the State of Indiana, this 30th day of March, A. D. 1860. ANDREW DAVISON,

Chief Justice of the Supreme Court of the State of Indiana.

(Bond.)

Know all men by these presents, that we, Samuel Verden and Daniel Mace, of the State of Indiana, are held and firmly bound unto Isaac Coleman of the same State, in the penal sum of seven thousand dollars, to be paid to the said Coleman, his executors or administrators, to the payment of which well and truly to be made, we bind ourselves and each of us jointly and severally, our heirs and executors, firmly by these presents, sealed with our seals and dated this day of March, A. D. 1860. Whereas, the above named Samuel Verden hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment of the Supreme Court of said State of Indiana, rendered at the May term of said court for the year 1858, in a cause wherein the said Samuel Verden was plaintiff, and the said Isaac Coleman (was) defendant: now, therefore, the condition of the above obligation is such, that if the above named Samuel Verden shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this bond shall be void, else in full force and virtue.

DANIEL MACE. [SEAL.]

Approved by me this 30th day of March, A. D. 1860.

ANDREW DAVISON, Chief Justice
of the Supreme Court of the State of Indiana.

State of Indiana, Supreme Court, *ss.*

I, William B. Beach, Clerk of the Supreme Court of the State of Indiana, do certify the above and foregoing to be a full, true, and complete copy of the transcript of the record of the court below, the assignment of errors and answer thereto, the opinion and judgment of the Supreme Court of the State of Indiana, the writ of error, citation, and appeal bond in the case of Samuel Verden against Isaac Coleman.

In witness whereof I hereto set my hand and affix the seal of said court at Indianapolis, on the twenty-fourth day of April, in the year of our Lord one thousand eight hundred and sixty.

[SEAL.] WM. B. BEACH, C. S. C.

The United States of America, greeting:

To Isaac Coleman, or Zebulon Beard, his Attorney.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on

the first Monday of December next, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Indiana, wherein Samuel Verden is plaintiff in error, and you, Isaac Coleman, is defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Hon. Andrew Davison, Chief Justice of the Supreme Court of the State of Indiana, this 22d day of August, 1860.

ANDREW DAVISON.

I, the above named Zebulon Beard, attorney for the said Isaac Coleman, do hereby acknowledge service of the above citation this 22d day of August, 1860.

Z. BAIRD,
Att'y for Coleman.

State of Indiana, Tippecanoe County, *ss.*

Personally appeared before me, the undersigned notary public in and for said county and State, Daniel Mace, and being by me duly sworn, upon oath, says, that the above named Zebulon Baird acknowledged service of the above citation in manner and form above stated and subscribed by him.

DANIEL MACE.

Witness my signature and seal of office, this 27th day of August, A. D. 1860.

[L. S.]

J. J. JONES,
Notary Public.

Filed 7th Sept., 1860.

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SUPREME COURT OF THE UNITED STATES.

No. 130.—DECEMBER TERM, 1861.

SAMUEL VERDEN, PLAINTIFF IN ERROR,

vs.

ISAAC COLEMAN, DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

Brief of Plaintiff in Error.

Coleman filed a bill in equity in the Benton county circuit, to foreclose a mortgage given by Verden to him.

A decree of foreclosure was made in the circuit court, from which Verden appealed to the supreme court of the State, where the decree of the circuit court was affirmed, with one per cent. damages and costs. It was then removed here by writ of error.

The following is the case, as presented by the pleadings and evidence:

The complainant set out a note given by Verden to him for $2,315, and a mortgage on six pieces of land, to secure the payment thereof, and he prayed judgment of foreclosure.

The defendant, in his answer, admitted the giving of the note and the execution of the mortage; and set up, by way of avoidance, the following facts:

That the defendant purchased, at the time the note and mortgage were given, six pieces of land, five from the complainant and one from Samuel Coleman, for the gross sum of $4,315, of which he paid down $2,000, and gave the note and mortgage in question to secure the balance, $2,315. That, at the time of his purchase, he was informed by the complainant that the legal title to five of said pieces was vested in one Banta, who held it in trust for complainant's benefit, and, at the request of the complainant, he made a conveyance thereof to the defendant; that the other piece was conveyed by Samuel Coleman to the defendant. The whole six lots were included in said mortgage, and the whole constituted one transaction.

GEO. S. GIDEON, printer, 511 Ninth street, Washington.

That one of the said six pieces was patented, in 1841, to one Hewett, as a pre-emptor, and that Banta's title to it rested upon this patent, and that the value of this lot was greater than the sum specified as due on said note and mortgage.

That the land patented to said Hewett had been reserved, by an Indian treaty of 1832, to one To-pen-ne-bee, and selected and located by the President of the United States under it, before he took his pre-emption title; and that said land, at the time of the conveyance to defendant, and the giving of said note and mortgage, legally belonged to said To-pen-ne-bee, and that Hewett acquired no title to the same, and that he conveyed none to Banta, and that Banta conveyed note to defendant; and that, consequently, to the extent of the value of said piece of land, there was no consideration for said note.

The defendant set out the documents upon which To-pen-ne-bee's title rested.

The complainant demurred to this answer, and the demurrer was overruled; and he then replied specially, admitting most of the allegations contained in the answer, but denying the conclusions drawn from them by the defendant, as to the rights of To-pen-ne-bee and Hewett. He insisted that Hewett acquired the legal title as a pre-emptor, and that To-pen-ne-bee acquired none by the treaty and the proceedings had under it. He set out the documents upon which the Hewett title rested.

The defendant demurred to the replication, which demurrer was overruled, and a decree of foreclosure entered.

The defendant appealed to the supreme court of the State, where the decree was affirmed.

He thereupon removed the cause to this court by a writ of error, under the 25th section of the judiciary act.

POINTS.

FIRST. *This court can pass upon the questions now raised.*

The first point made by the defendant in error in his brief is, that the questions raised in a former brief in this cause could not be considered here, because they were not so raised at the Benton circuit as to authorize the supreme court of Indiana to consider them. This same question is now presented in this brief.

This objection cannot be raised in this court, for various reasons:

1. It presents a mere matter of practice in an inferior court, and has nothing to do with the merits of the case, or the question upon which this court, as a reviewing tribunal, can act.

2. It is not sustainable, under the laws and practice in the supreme court of Indiana.

The laws of Indiana (code of 1852) authorize the supreme court to make rules in relation to the practice and business before it. Its jurisdiction is exclusively appellate. Among its rules, made under the law, is the following, found in the 4th and 14th of Indiana Reports, page IX:

Rule 28. "Points not made in some of the briefs by counsel will be considered as waived in the suit in which the briefs are filed, and may be treated by the court accordingly."

Note by Reporter, in 14th vol., p. IX: "This rule has been strictly observed in numerous cases. (See the Jeffersonville Railroad vs. Buttor, 9 Ind. R., 205; Henderson vs. Burch, 10 id., 54; Shaw vs. Binkard, id., 231; Zehnor vs. Crall, id., 547.")

There is nothing in this record showing that the present objection was raised in the State supreme court; and, consequently, it was waived, and cannot now be raised. This court will neither revise nor reverse the practice of the court below, and especially when no question was raised there by the party, and ruled against him. If the complainant below had been beaten, and had brought error, one of this character could not be assigned here, under any circumstances. And, beyond all controversy, it could not, when the record does not show that it was raised below.

3. The only question passed upon below is the one now raised by the plaintiff in error here under the 25th section of the judiciary act, to wit, that concerning the conflicting titles.

The constitution of Indiana provides (Art. 7, § 5) as follows: "The supreme court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case, and the decision of the court thereon." The record in this case (p. 30) states: "Opinion. The facts in this case, and the questions of law arising in the record before us, are precisely similar to those in a case between the same parties decided at the November term of this court, 1853. (See Verden vs. Coleman, 4 Ind. R., 457.) Upon the authority of the case cited, the judgment in the present case must be affirmed. The judgment is affirmed with one per cent. damages and costs."

By turning to the case referred to, (which was brought here and dismissed because there was no final judgment shown in the record, 18 How., 86,) the following will be found:

"In considering this case, we shall pass by the question of the right of the mortgager to dispute the title to land he has mortgaged; and also the question as to the power of any department of the Government, other than the judiciary, to set aside a grant of land, as is alleged was attempted to be done in reference to the section selected for To-pen-ne-bee; and shall inquire what grant has been made in the case, who, according to the showing in the record, now has the legal title to the land in dispute."

From this, it is perfectly certain, that the questions below were not those of practice under the laws of Indiana, and that none such were raised, but that the sole question was the effect of the provisions of the treaty, and the location under the authority of the President, and whether the action of the General Land Office, under the pre-emption laws, annulled what the President had done under the treaty, so as to give preference to the Hewett title. This question is now raised, and if decided against the plaintiff in error he must fail; but, if determined in his favor, this court will determine all incidental questions necessarily arising in the case.

SECOND. *This court has appellate jurisdiction in this case.*

The 25th section of the judiciary act provides: "That a final judgment or decree, in any suit in the highest court of law or equity of a State, in which a decision in said State can be had, *where is drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States*, and the decision is against their validity, * * * may be re-examined," &c.

The present case is within the letter and spirit of this provision. The case went to the highest court in the State. The following questions were involved in the determination of the case:

1. The treaty with the Pottawatomies. The defendantclaimed that his rights in the case depended upon its being determined that To-pen-ne-bee took a vested right under it. The other side insisted that he took nothing under it, but could only acquire by grant under a patent, and the court so held and overruled the right claimed by the defendant, as resulting from the treaty.

2. The defendant claimed that To-pen-ne-bee's rights to the land in question were protected from encroachment by pre-emptors, by the Indian intercourse act of 1802, and the pre-emption act of 1838, as revived in 1840. The complainant denied that those acts protected them, or prevented Hewett from appropriating them to his own use. The State court held that these acts were no protection of To-pen-ne-bee's interest; and, therefore, the right which the defendant claimed, resulted to him from them, failed. (See Opinion of the Court, R., p. 30; and the case, 4 Ind. Rep., 457.)

3. The validity and effect of the act of Douglas, and of President Van Buren, in making and approving the location for To-pen-ne-bee of the land purchased, were directly drawn in question; the defendant claimed rights growing out of them, and the court determined against their validity, and held, that they amounted to nothing.

These questions necessarily arose under the pleadings, and must have been decided. The defendant set up, in his answer, that the land sold him, and for the consideration of which he was prosecuted,

passed to To-pen-ne-bee under the treaty, and was located and became his separate property by the location, and was protected from pre-emption. The other side claimed the reverse, and the court decided in their favor, and determined that neither of these things protected the defendant from the demand made upon him, because To-pen-ne-bee took no title to the land.

The point was, whether what had been done conferred title to that particular section of land upon To-pen-ne-bee or upon Hewett. The court determined that the things set up by the defendant conferred no title on To-pen-ne-bee, but that the other matters set up by the complainant, Hewett's patent, conferred title upon him. This was setting up a right under the treaty, statutes, and acts of the Executive, to be exempt from making payment. The complainant set up other executive acts on which he rested his claim. The court decided against the former, and in favor of the latter. This is all that is necessary, under the statute and decisions, to give this court jurisdiction. It cannot be necessary that the thing itself, which was the subject of consideration under the treaty, law, or executive act, should be so situated as to be decreed to pass from one party to the other in the case on trial, but that rights, duties, or obligations growing out of it should be involved, and be decided against the party seeking the review in this court. If A covenants to make B legal title to a tract of land, and B covenants, on receiving it, to pay A for it, and the latter tenders a title under a patent from the General Land Office, which was forbidden by law to be issued, it is clear that B could not be compelled to receive it. If A should sue him on his covenant to pay, the legality of the title under the law of Congress would be directly involved; and if the court should mistake the law, and hold that the title was legal, though forbidden by statute, clearly B would be authorized, under the 25th section of the judiciary act, to bring the case to this court, although the decision below would not confer the title upon either party to the suit. The present case presents the exact same question.

THIRD. *The land in question, at the time of Hewett's entrance upon it, was not open to settlement by white men, nor was it subject to pre-emption by them at the time he obtained his pre-emption title, if there had been no treaty provision for the benefit of To-pen-ne-bee.*

All the acts of the parties in acquiring pre-emption titles must be legal, and in conformity with the laws. The entry upon the land, the continuance there, and the authority to confer title must be legal. As the pre-emption laws are designed to confer special benefits, the duties they enjoin by law cannot be waived.

In this case, Hewett's acts were illegal, according to the show-

ing of the complainant; and, consequently, he could acquire no title under them.

The first section of the act of the 30th of March, 1802, (2 U. S. L., 139,) fixes the eastern boundary of the Indian country at a point far east of the land in question, beginning at the mouth of the Cayahoga river, on Lake Erie, and extending southerly. The second and third sections prohibit the whites going into the Territory without passports. The 5th provides as follows:

"That if any such citizen, or other person, shall make a settlement on any lands belonging or secured or granted by treaty with the United States to any Indian tribe, or shall survey, or attempt to survey such lands, or designate any of the boundaries, by marking trees or otherwise, such offender shall forfeit a sum not exceeding one thousand dollars, and shall suffer imprisonment not exceeding twelve months."

It then provides that the President may take measures to remove intruders from Indian lands by force.

Prior to the treaty of 1832, the land in question belonged to the Indian occupants. The treaty of Fort McIntosh, of January 21, 1785, (7 U. S. L., 16,) covers it, although the Pottawatomies are not named. The treaty of Fort Harmer, dated January 9, 1789, (7 U. S. L., p. 28,) was with this and other tribes. They both set apart a large country, including the land in question, and each contains a provision intended to prevent white men settling within the Indian territory. (§§ 5 and 9.) Those who attempt to do so "forfeit the protection of the United States." These treaties remained in force as long as the Indians remained the owners or possessors.

The act of 1802 remained in force until the passage of the act of 1834, (4 U. S. L., 729,) and it was continued in force, by the proviso to the 29th section of that act, (4 U. S. L., 734,) west of the Mississippi. Hence, it is certain that white men were forbidden by law from settling upon these lands.

In his replication, the complainant admits (R., p. 13) that Hewett went upon the land in question and settled there sometime in 1832, and remained there until after the 19th of June, 1834; and, at page 14, he states that he continued there until 1840. It is under this entry and occupancy that Hewett claimed the right of pre-emption. But, as it commenced and was continued in violation of treaty and law, his possession was tortious, and could not authorize its pre-emption.

It would be a gross wrong to allow an illegal and prohibited act to ripen into a legal right in favor of the wrong-doer. An entry upon Indian lands being prohibited by statute, such entry cannot lay the foundation of a legal right. Prior to the treaty of 1832, the land in question belonged to the Indian nation, and after that it became private in many and specified respects Indian property,

to which Hewett could acquire no right. His application, under the pre-emption act of 1834, was rejected, and very rightfully. That act expired by its own limitation on the 19th of June, 1836. (4 U. S. L., 678.) After its expiration, Hewett could have had no right upon this land, if it had been a portion of the public lands.

When the act of 1838 (5 U. S. L., 251) passed, Hewett again applied to pre-empt his land; but he was unsuccessful, because the location for To-pen-ne-bee was in the way, and because that act forbid it in cases of settlement on Indian lands before the Indian title had been extinguished. He applied again under the act of 1840, (5 U. S. L., 382,) which was the act of 1838 extended, and was successful, the Land Office not respecting the decision under the act of 1838, nor observing the prohibitions of that act against intruders upon Indian lands. There were four objections in his way at that time, either of which should have prevented the Land Office from complying with his application:

1. The act of 1802, which prohibited the entry upon Indian lands.

2. The location in 1837 for the benefit of To-pen-ne-bee.

3. The act of 1838, (5 U. S. L., 251,) which excepts from pre-emption "any land specially occupied or reserved for town lots, or other purposes, by the authority of the United States." This act was continued in force by the act of June, 1840. (5 U. S. L., 382, § 5.) The land in question had been reserved by the United States for a special purpose—to fulfil a treaty stipulation—and could not be claimed under a pre-emption law. If it was not To-pen-ne-bee's property, it was reserved for him, and could not be pre-empted.

4. The pre-emption act of 1840 was a mere continuation of that of 1838, which provided: "*And provided, always*, That this act shall not be so construed as to give a right of pre-emption to any person or persons in consequence of any settlement or improvement made before the extinguishment of the Indian title to the land on which such settlement or improvement was made."

The treaty under which To-pen-ne-bee claims, although it bears date on the 27th of October, 1832, was not ratified and proclaimed until the 21st of January, 1833. (7 U. S. L., 399. But the complainant avers, in his replication, (R., 13,) that said Hewett, "sometime in the year 1832," "settled upon and cultivated a portion of the land described in said patent," and continued in possession. This shows that the settlement by Hewett was made before the extinguishment of the Indian title, and did not authorize a pre-emption. The proceedings taken under the extended act of 1838 (extended in 1840) were contrary to law, and conferred no right or title upon Hewett—being in violation of express statute law, they were null and void. This was so held in Stoddard vs. Chambers, (2 How., 284,) where the court said: "No title can be

held valid which has been acquired against law." It follows, that Hewett acquired no title, and had none to convey to Banta, and he had none which he could confer upon Verden; and, to this extent, there was no consideration for the note in question.

FOURTH. *Hewett was not a bona fide purchaser, because he knew of the rights and claims of To-pen-ne-bee before he made his purchase.*

The replication (R., p. 19) concedes the appointment of Douglas to locate the Indian lands under the treaty, and that he did so, as stated in the answer, in 1837. At page 20, it sets out the report of Mr. Crawford, made in April, 1839, when Hewett's pre-emption application under the act of 1838 had been sent to the War Department for consideration. In his report, Mr. Crawford refers to this location by Douglas in favor of To-pen-ne-bee, and states: "I know of no authority short of an act of Congress which can give him (Hewett) what I conceive to be his just rights." His pre-emption claim to the land in question was refused; but he did receive at that time a pre-emption patent for *another tract.* Hence, it is certain that Hewett knew of To-pen-ne-bee's rights, and acted in bad faith, when, in 1841, he sought to deprive him of them, without any fault on his part. Under such circumstances, Hewett took no title. His equity, as well as his legal right, was subordinate to that of the Indian; and he cannot complain if he failed in his attempt to deprive him of his just rights. This question was settled by this court in the case of *Ladiga vs. Rowland*, 2 How., 581, in a case arising under the Creek treaty, where the procurer of a patent from the President was not permitted to hold against the selection by the head of an Indian family. The following cases are to the same effect: 2 Yerger, 144, 432; 5 Yerger, 323; 5 Porter; Alabama R., 330, 427.

The complainant does not show that he was a bona fide purchaser, paying a full or fair consideration for this Hewett title. He does not, in this respect, make a case that authorizes him to claim the ordinary privileges of a bona fide purchaser. He does not even set up, in his replication, that he purchased in good faith, not knowing of the To-pen-ne-bee title.

FIFTH. *The title of To-pen-ne-bee was legal and valid, and, consequently, neither Hewett, Banta, nor the defendant, acquired any title to the land in question.*

The title of To-pen-ne-bee rests upon the following grounds:

1. On the 27th of October, 1832, a treaty was entered into with the Pottawatomies, proclaimed on the 21st of January, 1833, (7

U. S. L., 399,) by which they ceded to the United States their land in Indiana and Illinois.

The third article provides:

"The United States agree to grant to each of the following persons the quantity of land annexed to their names, which lands shall be conveyed to them by patent." * * *

"To To-pen-ne-bee, principal chief, one section. * * *

"The *foregoing reservations* shall be selected, under the direction of the President of the United States, after the lands shall have been surveyed, and the boundaries to correspond with the public surveys."

It will be observed, that this land is first spoken of as being the subject of grant; but afterwards it is denominated a "reservation," which was to be selected under the direction of the President. The last, under well settled rules of law, is the controlling description, and is a *reserve*, although evidence of To-pen-ne-bee's rights was to be furnished him in the form of a patent, which would be conclusive and convenient in form, although the title passed under the treaty and location.

2. In 1836, J. T. Douglas, after the lands had been surveyed, was appointed to locate the lands which had been reserved under this treaty. He made his report on the 20th of January, 1836.

On the 25th of March, 1637, these locations were reported to the Secretary of War, who, on the next day, wrote on it: "Respectfully submitted for the approval of the President, J. R. Poinsett;" who, on the same day, endorsed: "Approved, March 29, 1837. M. Van Buren." (R., p. 10.)

The President, by this act, executed the special power conferred by the treaty, and his authority over the subject was exhausted.

The President never attempted to recall this act, and he had no power to do so. Mr. Crawford recommended that he follow an illegal precedent, and annul his own execution of a single specific power; and Mr. Poinsett concurred in that recommendation, but did no more. But the President did not act affirming this recommendation; and Mr. Poinsett knew the President too well to venture to do so in his name, in a case where the President alone could act, and the latter was too good a lawyer to suppose he could revoke his execution of a special power, and exercise it a second time.

But the claimant insists that To-pen-ne-bee had no rights to the land in question, and could have none, except under a patent from the United States granting it to him.

This question has been otherwise settled, and once under this very treaty. When the location was once made, the title became perfect without a patent.

In *Godfrey vs. Beardsley*, (2 McLean, 412,) the Ottawas treaty

was construed. The 3d section (7 U. S. L., 219) provided, that "there shall be granted by the United States to each of the following persons, being all Indians by descent, and to their heirs, the following tracts of land, (naming them.) * * Said tracts shall be located after the cession is surveyed, in conformity with such surveys, as near as may be, and in such manner as the President may direct."

McLEAN, J., held that this article operated as a present conveyance when the reserves were located, and no patent was needed.

In *Astrom vs. Hammond*, (3 McLean, 107,) it was held that a final certificate from a land office operated as a conveyance, so as to subject the land to taxation, and that it would descend to heirs.

In *Ross vs. Borland*, (1 Pet., 655,) it was held that the parties had a right to go behind the conflicting patents, and test the right of the case; and the court determined, that where land had been confirmed by a board authorized to do so, that a subsequent purchaser at a public sale took no title, and that a title subsequently issued in pursuance of the decision of the board must prevail.

In *Mitchell vs. The United States*, (9 Pet., 711, p. 748,) this court said, that "purchases made at treaties held by their (the United States) authority, have been always held good by the ratification of the treaty, without any patent to the purchasers;" and upon this ground it sustained a Florida land claim.

In *Stoddard vs. Mitchell*, (2 How., 284,) the question was between an old Spanish concession, made in 1800, but not confirmed until 1836, and a New Madrid certificate, located in 1816, and a patent in 1832.

McLEAN, J., said: "No title can be valid which has been acquired against law; and such is the character of the defendant's, as far as it trenches on the plaintiff's. It has been argued that the first patent appropriates the land, and extinguishes all prior claims of inferior dignity. But this view is not sustainable. The issuing the patent is a mere ministerial act, which must be performed according to law. * * It would be a most dangerous principle, to hold that a patent should carry the legal title, though obtained fraudulently, or against law. Fraud vitiates all transactions. It makes void a judgment, which is a much more solemn act than issuing a patent."

In *Ladiga vs. Roland*, (2 How., 581,) the present question was directly decided. The 2d article of the Creek treaty of 1832, (7 U. S. L., 366,) provided for the survey of the ceded lands, and "when the same is surveyed, to allow ninety principal chiefs of the Creek tribe to select one section each, and *every other head of a Creek family to select half a section each;* which tracts shall be reserved from sale for their use for the term of five years, unless sooner disposed of. * * And twenty sections shall be selected,

under the direction of the President, for the orphan children of the Creeks, and divided and retained, or sold, for their benefit, as the President may direct."

Ladiga, the head of a Creek family, under the direction of the agent, selected the premises in question; which the sub-agent afterwards struck out of the list of selections; and it was subsequently selected by the President for the orphan children, and sold by him for their benefit, and a patent issued. This court held that Ladiga's selection was conclusive, and that, under it, she acquired full title, and that the subsequent acts of the President were of no legal validity.

In *Doe vs. Wilson*, (23 How., pp. 457, 463,) the question was under the present treaty, and whether Pet-chi-co, who was provided for in the same section with To-pen-ne-bee, had acquired title under the treaty, so as to be able to convey his interest before the location was made. This court held that he did, and said: "*The reservees took by the treaty, directly from the nation, the Indian title*, and this was the right to occupy, use, and enjoy the lands in common with the United States, until partition was made in the manner prescribed. The treaty itself converted the reserved sections into individual property. The Indians, as a nation, reserved no interest in the territory ceded; but, as a part of the consideration for the cession, certain individuals of the nation had conferred on them portions of the land, to which the United States title was either added, or promised to be added, and it matters not which for the purpose of this controversy or possession. The United States held the ultimate title, charged with the right of undisturbed occupancy and perpetual possession in the Indian nation, with the exclusive power in the Government of acquiring the right." * * "We hold that Pet-chi-co was a tenant in common with the United States, and could sell his reserved interest; and that when the United States selected the lands reserved to him, and made partition, (of which the patent is conclusive evidence,) his grantees took the interest he would have taken."

This is conclusive of the present question. When the treaty was made and ratified, To-pen-ne-bee took a present interest, and held it in connection with the Government; and when the selection of a section was made for him by the Government, by authority of the treaty, it was an effectual and legal partition, and his rights thereto became perfect, and could not be divested, either by the acts of the Government or any one else. The evidence of the separation of his land from that of the Government is equally conclusive, while unimpeached, as that of a patent, which is not a grant or conveyance, and nothing but mere evidence of the separation.

The land in question never became the property of the Government; and hence, it could not sell it. It belonged to the Indian

nation until the treaty was ratified, and then it became the property of To-pen-ne-bee, though held in connection with the United States, until the latter made partition by its agent, Douglas, and the President, in conformity with the special power conferred under the treaty. The Government had no title to it which it could convey to Hewett by patent or otherwise. It follows that those who claim under it through Hewett, had nothing to convey to Verden as a consideration for note in question.

If To-pen-ne-bee was entitled to a patent, which he clearly was, because he had through the treaty bought and paid for the land, and it had been located according to its provisions, then it was the duty of the Government to furnish him with one, as the most convenient and conclusive evidence of his rights. Its neglect to do so cannot deprive him of any right, nor authorize the United States to sell and convey the land to another. Hewett could not make a valid title from the Government's neglect to perform a duty imposed by the treaty.

It has been suggested that To-pen-ne-bee has lost his rights by lapse of time and non-entry. But if this were now true, it gave neither Hewett, or his grantees, any rights. His neglect was no injury to them. If the complainant's theory is correct, he could not have entered for want of a patent. He could do nothing without one. A patent may now be given him, and his rights under it would commence to-day, according to his theory. The complainant has thus furnished an answer to his own objection. But if his title became perfect, as we claim, when the section was located, there is no evidence upon which to assert that he had lost his rights by inattention to them. Whether he neglected them or not, could not lay the foundation for the Government or complainant appropriating and selling his land. If a statute of limitations could run against an Indian, under such circumstances, it would not give *title* to the complainant which he could convey, however much he might be able to profit by it in the way of continuing in possession.

Another answer is, that a title under a statute of limitation is not the one set up in the complainant's replication. In that he claims a legal title by patent to Hewett, and cannot now set up one differently acquired.

In no case is a purchaser bound to take a title which rests for validity upon the statute of limitations. He cannot know under what circumstances the occupant entered and held, and what admissions he may have made, nor whether the exceptions in favor of minors, non compos mentors, and femes covert, may not defeat the apparent rights growing out of possession.

What will be the position of the Government, if To-pen-ne-bee's title is not now recognised and established?

The faith of the United States stands pledged in and by the

treaty to give him a section of land within limits of the land ceded by the Indians. They promise to locate it, and to give him a patent, as evidence of his title. The land is selected and set apart by the President, and this we claim conferred title. But if it is now held, that all this goes for nothing, and that after selecting this section for him, the Land Office can sell it for a dollar and a quarter per acre, what becomes of the plighted faith of the Government? How and when and where is To-pen-ne-bee to obtain his land? Can he be required to take it in the far west, or to be turned off with refuse land that no one will buy at any price? Will not ignoring his rights now authorize him to demand the present value of the land in the Court of Claims, or how are his rights to be dealt with? It is insisted that the honor and good faith of the Government require that his rights to the land in question be respected and treated as valid.

SIXTH. *The right of the defendant to relief, if he acquired no title to the land in question, has beeu determined in his favor in the court below, and is not subject to review in this court.*

The complainant filed his bill, in the Benton circuit, praying a foreclosure. The defendant answered, that the note and mortgage were given for land worth more than the amount due, which formed the consideration, and that no title had been conveyed to him, setting out evidence to show that it in fact was the property of an Indian chief, acquired under a treaty. To this answer the complainant demurred, which raised two questions—first, whether the facts set up showed that no title had been conveyed to the defendant; and second, whether, if none had been conveyed, that fact was a sufficient answer to the claim of a foreclosure. The court overruled the demurrer, which determined both questions in favor of the defendant. Instead of appealing, the complainant elected to reply specially to the answer, setting up facts in avoidance of those contained in it.

The issue then was, whether the complainant had caused title to the land in question to be vested in the defendant. The court determined that he had, and from that determination the defendant appealed to the supreme court of the State, where the decree was affirmed. The defendant then brought the cause here.

The question, after the defendant's answer was held to be good as a matter of law, was not, whether the defendant was entitled to the relief he claimed, for that had been decided in his favor, and not appealed from, but simply whether the facts in the case entitled him to it. He had set up certain facts, and the complainant sought, by introducing additional facts, to show that the defendant had acquired good title. No other question was before either of

the courts below on the final hearing, and none other can be raised here. By replying additional facts, to avoid those in the answer, the complainant voluntarily waived the question as to the defendant's right to the relief claimed in the answer. He yielded that question, and cannot now raise it. It was not before the State supreme court, and cannot be reviewed here.

SEVENTH. *If the question of the defendant's right to the relief claimed in his answer is open on this review, he is entitled to the same, if he did not receive a legal title to the land in question.*

The defendant received certain conveyances, and, among them, one for the land in question, and, after paying a portion, gave the note and mortgage, which the complainant seeks to foreclose. The defendant answers, "that for one of the lots, worth the amount due, I received no title, but it is vested in another." The complainant replies, "You did receive legal title." He now says, "Whether the defendant received title or not, I am entitled to be paid, and that his only remedy is on the covenants in the deed, if any; and if the grantor, Banta, is not solvent, or not liable, then the defendant is without remedy." He tells the defendant, "You must pay me, and engage in further litigation, and trust to a remedy upon Banta; and if I am not liable over to him, I shall escape all loss; I throw it upon either Banta or you." It is against equity and good conscience to turn off the defendant with such an answer, if it is still within the power of the complainant to make any.

The following cases settle this question, and must control wherever the law and equity prevail:

In *Allen vs. Hammond*, (11 Pet., 63,) Allen had agreed to aid Hammond in securing a claim on Portugal, which, although unknown to either, had been allowed, and the latter filed a bill to vacate the contract. The court sustained the bill, saying there was not the shadow of a consideration to sustain it. MCLEAN, J., said, (p. 71:) "No court of equity is believed ever to have sanctioned such a principle" as the one contended for by the defendant.

In *Lewis vs. Wilson*, (1 Edwards Ch'y R., 305,) Vice Chancellor MCCOUN held, that "in a suit in equity, founded on the original consideration of a sale, or upon the *security* given for the purchase money, a defendant may set up in his answer a fraud or deceit in the sale, or *a breach of warranty, and show a total or partial failure of consideration*. It prevents circuity of action."

This case is cited with approbation in 2 Kent, pp. 473, 474.

In *McAllister vs. Read*, (4 Wen., 483, and affirmed in the court of errors, 8 Wen., 109,) it was held, in a case of warranty, that "in an action of assumpsit for an article sold at a stipulated sum, a defendant may give evidence showing the true value of the article

sold, in a case of breach of warranty, in reduction of the recovery claimed, as well in cases of warranty as in cases of fraud; such evidence being allowed to avoid circuity of action, and to prevent further litigation."

Miller vs. Smith, (1 Mason, 437;) *Harrington vs. Stratton*, (22 Pic., 510;) and *Becker vs. Vrooman*, (13 John. R., 302,) were decided upon the same principle.

In *Evans vs. Gray*, (12 Mar. L. R., 475, 483,) the court said: "Our law, which is, fortunately, not much embarrassed by rules merely technical, does not permit a plaintiff to recover money, which the defendant can the next day turn round and claim from him. It permits matters which diminish a demand, as well as those which destroy it, to be pleaded in defence."

At pp. 648, 649, the court say: "If he may be relieved *in toto* by plea, when he insists on the recision of the sale, and prays to be exempted from the payment of any part of the piece, why should he not be listened to when he restrains his plea to that part of the piece which the vendor would be compelled to return, if a suit was brought against him?"

In *Gray vs. Handkinson*, (1 Bay S. C., 278,) where the title to a part of the land for which a bond was given had failed, the court held that this "failure of consideration might be pleaded in discount in a suit on the bond."

Tucker vs. Gordon, (4 Dessausure, Eq. R., 53, 58;) *Still vs. Hall*, (20 Wend., 51;) and *Goodwin vs. Morse*, (9 *Met.*, 278,) proceeded upon the same principle.

Were these cases before the court, it is confidently assumed that this question is no longer an open one.

The doctrine of recoupment is applicable to this case, and will sustain the relief sought.

In *Batterman vs. Pierce*, (3 Hill., 171,) the court held, "that the right of the defendant to avail himself of a claim for damages by way of *recoupment*, is not confined to cases where fraud is imputable to the plaintiff, but may exist, though the damages may result from a mere breach of contract.

In *Van Epps vs. Harrison*, (5 Hill, 63,) in a suit upon a bond for real estate sold, the court held that damages, arising in relation to a false representation concerning such real estate, might be be recouped and applied on the bond.

If the defendant cannot obtain relief in the present suit, he may be wholly without remedy. The complainant will obtain all the advantages of the contract, and leave the defendant to pursue his rights at a future day, when neither the former nor Banta may be able to respond.

The ground assumed by the other side throws all the risks upon

the defendant, while the complainant will derive all the advantages he ever contemplated. He will get the value of another man's land, and enjoy it, and leave the purchaser with nothing but a future right of action, when he may be dead, or worth nothing. The policy of the law requires the matter to be settled now, when it can be equitably and legally done, between the original parties to the transaction, without the hazard of loss on either side.

EIGHTH. *The defendant became entitled to the relief he seeks when he discovered that no title was conveyed under the deed to him.*

If the claimant obtained the note and mortgage upon the ground that the defendant received title, when none was conveyed to him, the right of the latter to damages accrued instantly. To that extent no consideration passed to sustain them, and he had an immediate right of action, because the injury was already sustained. The defendant had no means of obtaining title short of purchasing of the real owner, who could make him respond in damages for the wrongful use of his property, if he went into possession and occupied the land. Mere occupancy by other persons could confer on him no title, nor could it take anything from the complainant, because the land was not his.

It has been repeatedly held, that in actions for a breach of covenant of seisin, the right of action is perfect on the execution of the covenant, and that eviction was not necessary to establish the right to damages. See *Hamilton vs. Wilson*, (4 J. R., 72;) *McCarty vs. Leggett*, (3 Hill, 134;) and *Bingham vs. Weederwax*, (Comstock, 509.)

The reason for allowing the defendant to set up want of title, by way of defence, is even stronger, because it avoids litigation and circuity of action. The mortgager is morally bound to set up his claim the first opportunity, instead of waiting the termination of litigation.

The principle now contended for has been affirmed on several occasions.

In *Christy vs. Reynolds*, (16 Serj. & Rawle, 258,) the action was on a note given for land sold. The court said: "In an action on a single bill given for lands sold, the obligor may give in evidence judgments against the grantor previous to the deed under which the land has since been sold, whether the clause of warranty in the deed be general or special."

The principal involved in this case is this: that, at the time of the suit on the note, owing to the fault of the plaintiff, the defendant had no title to the land; and hence, there was no consideration to support the note.

In *Steinbower vs. Witman*, (1 Serj. & Rawle, ,) and *Hart vs. Porter*, (5 id., 201,) it was expressly decided, that if an adverse title or incumbrance is discovered before the money is paid, such title or incumbrance is a defence against the payment of the money.

In *Park vs. Kelly*, (13 Serj. & Rawle, 165,) it was expressly decided, that "incumbrances, when discovered, are a defence against payment of the purchase money and the amount of the incumbrances, when there is a general warranty in the deed."

It is the settled doctrine in Indiana that a deed, which conveys nothing, will not support a promise to pay.

The case cited by the complainant, from the 8th of Blackf., 142, has no applicability to the one at bar, if it were considered law in that State. That was a case when the defendant set up a warranty against incumbrances which had been discovered, as a defence to a note given for the sale of land. The decision is opposed to numerous high authorities. But that case was not like the present, where no title to the land was conveyed to the defendant. The courts in Indiana have determined this point in favor of the defendant.

In *Hooker vs. Folsom*, (4 Porter Ind. Rep., 9,) it was held, that an *entire want of title* in the grantor, when the deed was given, would constitute a breach, the same as an eviction, by paramount title.

In *Smith vs. Ackerman*, (5 Blkf., 541,) it was held, that outstanding dower, when set off, was a defence on a note given as the consideration for the purchase of land, when there were covenants against incumbrances.

Conkling vs. Bowman, (7 Ind. R., 533,) fully sustains the doctrine now contended for.

(Head note): "Complaint to foreclose a mortgage. The mortgage was executed to secure the payment of two promissory notes, given in part consideration for two tracts of land, less than $3,000 due upon the notes. Answer. As to one of the tracts, the *grantors had not*, at the date of the deed, nor have they ever had *any title*, and that therefore the consideration, as to that tract, (which was alleged, by a sort of *vid beit*, to be of the value of $3,000,) had failed, &c. *Held*, on demurrer, that the answer was sufficient."

In *Murphy and another vs. Jones and another*, (7 Ind. R., 529,) the supreme court of Indiana held, that "the execution of a deed which conveys nothing is not a sufficient consideration to support a promise by the grantee to the grantor."

These cases settle the question at bar. The complainant's counsel remarks, in his brief, that he had not examined the cases formerly cited on this subject, because the rule in Indiana controls. If it does, then this case must be determined against him.

He refers to *Henderson vs. Griffin*, (5 Pet., 151,) as an authority that this court will follow the settled decisions of the State courts in construing State statutes, and in relation to the transmission of

titles to land. This doctrine was settled in the 12th Wh., 153, 167; but it does not apply to the present case, where the question is, what are the rights of the parties, when there was no tittle to constitute the consideration of a note given for land sold? But if it did apply, the Indiana decisions are against him.

But this question was not, it is believed, before the supreme court of Indiana, nor considered by it. That court directed its attention to the question, whether the treaty and location under it conferred title upon To-pen-ne-bee, or whether Hewett took, under the pre-emption laws, the title to the land in question.

No other question was properly before the court below, or can, in the first instance, be considered here.

R. H. GILLET,
DANIEL MACE,
Of Counsel for Plaintiff in Error.

January 27, 1862.

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It is the settled doctrine in Indiana that a deed, which conveys nothing, will not support a promise to pay.

The case cited by the complainant, from the 8th of Blackf., 142, has no applicability to the one at bar, if it were considered law in that State. That was a case when the defendant set up a warranty against incumbrances which had been discovered, as a defence to a note given for the sale of land. The decision is opposed to numerous high authorities. But that case was not like the present, where no title to the land was conveyed to the defendant. The courts in Indiana have determined this point in favor of the defendant.

In *Hooker vs. Folsom*, (4 Porter Ind. Rep., 9,) it was held, that an *entire want of title* in the grantor, when the deed was given, would constitute a breach, the same as an eviction, by paramount title.

In *Smith vs. Ackerman*, (5 Blkf., 541,) it was held, that outstanding dower, when set off, was a defence on a note given as the consideration for the purchase of land, when there were covenants against incumbrances.

Conkling vs. Bowman, (7 Ind. R., 533,) fully sustains the doctrine now contended for.

(Head note): "Complaint to foreclose a mortgage. The mortgage was executed to secure the payment of two promissory notes, given in part consideration for two tracts of land, less than $3,000 due upon the notes. Answer. As to one of the tracts, the *grantors had not*, at the date of the deed, nor have they ever had *any title*, and that therefore the consideration, as to that tract, (which was alleged, by a sort of *vid beit*, to be of the value of $3,000,) had failed, &c. *Held*, on demurrer, that the answer was sufficient."

In *Murphy and another vs. Jones and another*, (7 Ind. R., 529,) the supreme court of Indiana held, that "the execution of a deed which conveys nothing is not a sufficient consideration to support a promise by the grantee to the grantor."

These cases settle the question at bar. The complainant's counsel remarks, in his brief, that he had not examined the cases formerly cited on this subject, because the rule in Indiana controls. If it does, then this case must be determined against him.

He refers to *Henderson vs. Griffin*, (5 Pet., 151,) as an authority that this court will follow the settled decisions of the State courts in construing State statutes, and in relation to the transmission of

titles to land. This doctrine was settled in the 12th Wh., 153, 167; but it does not apply to the present case, where the question is, what are the rights of the parties, when there was no tittle to constitute the consideration of a note given for land sold? But if it did apply, the Indiana decisions are against him.

But this question was not, it is believed, before the supreme court of Indiana, nor considered by it. That court directed its attention to the question, whether the treaty and location under it conferred title upon To-pen-ne-bee, or whether Hewett took, under the pre-emption laws, the title to the land in question.

No other question was properly before the court below, or can, in the first instance, be considered here.

R. H. GILLET,
DANIEL MACE,
Of Counsel for Plaintiff in Error.

January 27, 1862.

SUPREME COURT---UNITED STATES.

DECEMBER TERM, 1861.

ISAAC COLEMAN, *ads.* SAMUEL VERDEN, } *Error to the Supreme Court of Indiana.*

This case has been brought to this Court on a writ of error to the Supreme Court of Indiana, under the 25th section of the judiciary act. Coleman in March, 1856, commenced a suit against Verden in the Benton Circuit Court, in the State of Indiana. He avers in his complaint that Verden, being indebted to him in the sum of $2,315, on the 10th of April, 1850, executed to him his promissory note for that amount, payable in one year, and also, a mortgage on certain real estate, to secure the payment of the same. The complaint concludes with a prayer that Coleman have judgment against Verden for $4,000, and also for the foreclosure and sale of the mortgaged property to pay the same. The note and mortgage were made parts of the complaint, and are copied in the record.

At the same term, Verden entered his appearance to the complaint, and answered the same. He states in his answer that, at the date of the note, he purchased from Coleman the real estate described in the mortgage for the agreed price of $4,315, of which he paid at the time $2,000, and that the note described in the mortgage, sought to be foreclosed, was given for the deferred payment; that one tract of said lands, viz., the south-west fractional quarter of section thirty-one, in township twenty-six, north of range nine west, was conveyed by the United States to one Hannaniah Hewitt, August 10th 1841, and afterwards by Hewitt to one Isaac Banta, who held the same in trust for Coleman; that at the time of said purchase, neither Coleman

or Banta had ony title to that tract of land, and that the same was worth more than the amount of the mortgage debt. "In order to show that neither Banta or Coleman had any title to the land above described," the answer further avers that in October, 1832, the United States of America made and concluded a treaty with the Pottawattamie Indians, by which the former purchased of the latter a large tract of country, including the tract of land above described, by the terms of which treaty, among other reserves, one section of land was reserved to an Indian by the name of To-pen-e-be, to be located under the direction of the President of the United States; that after said treaty was made and concluded, and long before the date of the patent to Hewitt, the President of the United States appointed one J. T. Douglas to locate and set apart the tracts of land reserved to the reservees therein; that said Douglas accepted said appointment, and on the 20th of January, 1836, made his report to the proper department of the government at Washington, that he had selected said section thirty-one for To-pen-e-be, and that President M. Van Buren, on the 29th of March 1837, approved the same. The report and approval are made parts of the answer. The answer insists that the title so patented to Hewitt had, previous to the date of his patent, by virtue of said treaty and location, become vested in To-pen-e-be, whose title was therefore paramount to that of Hewitt.

To this answer, Coleman demurred, but the Circuit Court overruled the demurrer, whereupon Coleman filed his reply to the answer. The reply admits all that is said in the answer, so far as the same relates to the consideration of the note described in the mortgage sought to be foreclosed. It also admits the sale by Coleman to Verden, at the time and upon the terms named in the answer, of the lands described in the mortgage, and that the same were, about the time of said sale conveyed by Banta, who held them in trust for Coleman, at the instance of the latter to Verden. The reply further admits that the title so sold by Coleman and conveyed by Banta, was derived from Hewitt, but denies that Hewitt's equitable title thereto commenced with said patent, and avers that long anterior to the location mentioned in the answer and approval thereof by the President, Hewitt settled upon and cultivated the land described in his patent, and continued in the cultivation and possession thereof until after the passage and approval of the pre-emption law of 1834, immediately after the passage of which law, and before the expiration of two years, Hewitt made three applications to the Register of the Land Office at

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Crawfordsville, Indiana, to prove his claim as a pre-emptor of said land, and to enter and pay for the same, which applications were refused for the reason that the township plats of the land on which his claim was located had not been received at that office; that Hewitt continued in the occupation and possession of said land until August 1840, when he again made application to said Register to prove his pre-emption claim thereto, and to enter and pay for the same, and produced his own affidavit and the affidavit of other witnesses in support thereof, which proofs were then approved and certified by the Register at Crawfordsville, and forwarded to the General Land Office at Washington, for the approval of the President, and that shortly after said proofs had been so forwarded, the original patent, a copy of which is made a part of Verden's answer, was issued in pursuance of said application, in the name, and by the authority, of the United States, to said Hewitt. The proofs so made by Hewitt, the directions given by President Jackson in 1835, upon the suggestion of Mr. Woodbury, then Secretary of the Treasury, the report of J. Hartley Crawford, upon the application of Hewitt, and the approval thereof by Mr. Poinsett, then Secretary of War, are made parts of the reply. The reply denies that by the treaty between the United States and the Pottawattamie Indians, a section of land was *reserved* to To-pen-e-be, but admits that said treaty provided that the United States thereby *agreed* to grant to To-pen-e-be one section of land, not out of the lands ceded, but out of any portion of her public domain, *which should be conveyed to To-pen-e-be by patent.* The reply denies that the report and approval vested any title in To-pen-e-be, but insists that the same remained subject to the control of the President, until the issuing of such patent, and that the Commissioner of Indian affairs on the 20th April, 1839, made a report to the War Department at Washington, in favor of setting aside said location, which report was concurred in by Mr. Poinsett, then Secretary of War. The reply also denies that To-pen-e-be or any grantee of his, is, or ever was in possession of the land patented to Hewitt, and charges that Coleman was in possession of the land at the time the same was purchased from him by Verden, and that immediately after that purchase, Verden placed Sumner in possessiou of the same under the title which Banta, at the instance of Coleman, had conveyed to Verden.

To this reply Verden demurred; the Circuit Court overruled the demurrer, *to which ruling of the Benton Circuit Court Verden took no exception.*

The facts as developed by the pleadings and evidence are these: On the 10th of April, 1850, Coleman sold the lands described in the mortgage, to Verden for $4,315, of which Verden paid $2,000, and to secure the remainder executed to Coleman his promissory note in an amount corresponding therewith, and mortgage on the lands sold. The legal title to the lands was at the time in Banta, who held them in trust for Coleman. For one tract of the lands sold—the southwest fractional quarter of section thirty-one, in township twenty-six, north of range nine west a patent from the United States was issued to Hannaniah Hewitt, under date of August 10, 1841, who on the 23d October, 1841, in consideration of two hundred and seventy dollars, sold and conveyed the same by warrantee deed to Lorenzo Hewett, and the latter on the 9th June, 1843, in consideration of one thousand dollars, sold and conveyed the same to Banta, who took the same in trust for Coleman. At the time of the sale by Coleman to Verden, Banta in accordance therewith, conveyed to Verden. The fractional quarter section alluded to is embraced in a tract of country ceded to the United States by the Pottawattamie Indians, by a treaty made and entered into on the 27th October, 1832, the third article of which provides that "the United States agree to grant to "To-pen-e-be one section of land which shall be conveyed to him by "patent, the same to be selected under the direction of the President "of the United States." After the treaty was made and concluded, the President appointed J. T. Douglas to select the section of land which the United States had thereby *agreed* to grant to To-pen-e-be, who reported to the office of Indian affairs on the 20th of January, 1836, that he had selected for To-pen-e-be said section thirty-one. This report was approved by President Van Buren on the 29th of March, 1837. In August, 1840, Hannaniah Hewitt made his application for permission to enter the land described in his patent as a pre-emptor, and produced his proofs in support of his claim. From this application and the proofs made in aid thereof, which were forward to the General Land Office at Washington, it appears that Hewitt, the patentee, settled upon and cultivated the fractional quarter section in controversy in 1832, and continued in the possession and cultivation thereof until the making of said application and proofs. It also appears from these proofs that the public lands in that region were surveyed in 1834. On the 20th April, 1839, Mr. Crawford, then Commissioner of Indian affairs, made a report to the Secretary of War, upon the respective claims of Hewitt and To-pen-e-be, in which

he maintains the superior equity of Hewitt, and recommends that the location of To-pen-e-be's float be set aside in favor of Hewitt, which report the Secretary of War concurred in. It also seems from the record that a similar decision had been made by President Jackson in relation to lands in the La Porte district.

Upon these pleadings and facts, the case was submitted for trial to the Court, a jury being waived. The Benton Circuit Court rendered the decree which appears in the record. *No motion was made for a new trial, and hence that Court had no opportunity to review its rulings.* The Supreme Court of Indiana affirmed the decree of the Benton Circuit Court. The assignment of errors in the Supreme Court of Indiana is as follows:

1st. "The Circuit Court erred in not sustaining the demurrer to "the reply."

2nd. "The said Court erred in rendering judgment for the plain- "tiff, when from the record judgment should have been for defend- "ant."

The latter assignment according to the practice of the Supreme Court of Indiana, as we shall see, in the sequel of this brief, is void.

I.—*The points made by the plaintiff in error, in the printed brief of his counsel, were not reserved in the Benton Circuit Court, in a mode that the Supreme Court of Indiana, could, according to the practice of that Court hear and determine the same, and hence they cannot be heard and determined here.*

The 25th section of the Federal Judiciary act confers jurisdiction upon this Court to re-examine, reverse or affirm the final judgment, or decree, in any suit in the highest court of law or equity of a State, *where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity.* It is obviously, essential to the attaching of this jurisdiction that some one of the enumerated questions be first presented to the Supreme Court of the State from which the writ of error is prosecuted, in a mode sanctioned by the laws of such jurisdiction, and the practice of such Court. Unless this has been done in the case at bar, this court cannot interfere. Now, in Indiana, in 1852, we adopted a code of practice, which is comprised in the 2 volume of the Code of 1852. That code came in force on the 6th May, 1853, (Perkins Ind. Dig. p. 863) and still is in force, and hence this case was

prosecuted in the courts of that that State, under that code, for it was commenced in May, 1856. The first error assigned in the Supreme Court of Indiana was, that the Circuit Court erred in overruling Verden's demurrer to Coleman's reply to the answer. To this action of the Circuit Court, Verden took no exception in that Court. Under the old practice obviously, it was not essential to expressly take such exception, but the Supreme Court of Indiana have decided that the rule is different under the code of 1852. This was first decided in the case of Zehnor vs. Beard, 8 Ind., p. 96. In that case the defendant in the Circuit Court demurred to the plaintiff's reply to his answer, which the Circuit Court overruled. The defendant did not expressly except. The overruling of the demurrer was assigned in the Supreme Court for error. Stuart J. who delivered the opinion of the court said: "There was no exception taken to the opinion of the court overruling "it. The law on this subject will be found under the head of 'excep- "tions,' 2 R. S. p. 115, 116. The old system is so familiar to the bar "that some confusion has arisen from failing to distinguish the change "in this respect. The new system defines an exception to be an ob- "jection taken to a decision of the Court upon a matter of law. Sec- "tion 342. Decisions upon demurrer are clearly embraced. The "exception must be taken at the time the decision is made. Section "345. When the decision and the grounds of objection appear in the "record, the party may save the question by noticing at the end that "he excepts. Section 345. Thus in the present case, reply, demurrer "specially pointing out the cause, and the decision of the court over- "ruling it, are all in the record. But that is not sufficient. The ex- "ception must be noted at the end of the decision, otherwise it is "waived. 2 R. S. p. 39 s. 54, and p. 42, secs. 64 and 67. When "the obnoxious decision or the grounds of it do not appear of record, "the exception must be reduced to writing, after the manner of the "former practice. Section 346. Thus while the mode of excepting "is varied to suit every contingency, the exception itself, as essential "to save the question, is necessarily established.

"The 347th section illustrates, but does not in the least impair the "view taken of the preceding sections. It is more specific as to the "forms to be observed in taking a reserved question to the Supreme "Court. The reserved question, may be taken upon a bill of excep- "tions showing the decision, or, if it arises on demurrer upon the "pleadings involved." "These two clauses of the sentence quoted, "clearly relate back to the two sections, next referred to; the former

"to the 346th section; the latter to the 345th section. Thus does it "appear that the exception taken in some form in the court below, is "indispensable to bring the question judicially before the Supreme "Court. If not taken at the proper time, in one or other of these "modes, the exception is waived, and the record presents nothing to "be determined. Even in criminal cases, the defendant is held to the "same strictness." The rulings of the Supreme Court of Indiana, under the new code of practice, upon this question are numerous, and invariably to the same effect. See Wheeler et al. vs. Carpenter et al., 9 Ind. 153, Strange et el. vs. Matlack, 9 Ind. 176, Meharry vs. Simmons, 9 Ind. 177, Scott vs. Stipe, 9 Ind. 180, Gill Township et. al. vs. Hadden et. al., 9 Ind. 182,—9 Ind. p. 350, Jewett vs. Siddons, 9 Ind. 455. It is useless to multiply the Indiana cases on this subject.

The other error assigned in the Supreme Court of Indiana is, "that the Benton Circuit Court erred in rendering judgment for the "plaintiff, when from the record, judgment should have been for the "defendant." This assignment of error is void. Under the present Indiana code of practice, which was in force, when this suit was commenced in the Benton Circuit Court, every assignment of error must be special, and specifically define the error complained of. This point was decided by the Supreme Court of Indiana, at its May term 1856, in the case of Kimball vs. Sloss, 7 Ind. 589, in which case *Stuart J.* said; "the first error assigned in the general assignment is "that the judgment is for Sloss, when by law it should have been for "Kimball. This error raises no question for our consideration. It "is too general. There must be a specific assignment of all errors "relied upon. 2 R. S. 161." King vs. Wilkins, et al. 10 Ind. 216. Ruffing et al. vs. Tilton et al. 12 Ind. 259. It must be remembered that the Ind. R. S. of 1852, abolished all distinction between common law and chancery practice. The two cases last cited, were proceedings in the nature of bills in equity under the old practice.

Independent of this consideration, the second error assigned could not avail the plaintiff. The evidence upon which the Benton Circuit Court rendered the decree complained of, is set forth in the record, but no motion was made for a new trial, and hence no opportunity afforded to the court to review its findings, which resulted in that decree. Under the Indiana practice this is necessary, *although the case may have been tried by the Court.* In Addleman vs. Erwin et al. 6. Ind. 494, the court said,—"Assumpsit by Addleman vs. Er- "win and others, for money paid, &c. Trial by the Court and judg-

"ment for the defendants. *The trial was in* 1854, *under the new* "*practice.* A motion for a new trial was made, but not being in wri- "ting, it could not be noticed. * * * The record presents no "question for our consideration." In Spencer vs. Russell, 9 Ind. 157, the following language is held; "Suit upon a contract for the "return of cattle, &c. Issue of fact upon the question of return. "Trial by the Court. Judgment for the plaintiff with costs. The "defendant below seeks to reverse the judgment because it is unsus- "tained by the evidence. No motion for a new trial was made, nor "was a case prepared under section 341, 2 R. S. p 115. Hence no "question on this point is presented." True the record in this case informs us that Verden by his counsel excepted to the finding and and judgment of the Benton Circuit Court, but under the Indiana practice, there can be no exception taken to the finding and judgment of a court. In the case of the State on the relation of Foster et al. vs. Swarts et al. 9 Ind. 221, Stuart J., who delivered the opinion of the court, said—"But the record does not present the question. The "bill of exceptions runs thus: Which was all the evidence given on "the trial of the above entitled cause, wherefore the court found for "the defendant and rendered judgment accordingly. To which find- "ing and rendition of judgment, the plaintiff excepts, and prays that "this, his bill of exception may be signed, &c. There are two fatal "exceptions to the form of this record. It does not appear that the "plaintiff moved the court for a new trial. This was essential to "enable the court to review its own action. It is due to the lower "court that its errors, if any, should be pointed out there, so that it "may retrace its steps while the record is yet under its control. "Without a motion for a new trial, the attention of that court is not "called to its own errors. It is not apprised of what they are. "That motion was essential to bring any of the questions, arising in "the trial, before us—unless the record had been made up under the "347th section of the practice act. Foster and wife except to the "finding and judgment. We know of no such practice either under "the old law or new system. The finding of a court stands precise- "ly like the verdict of a jury." See also Doe e. d. Condit et al. vs. Webb et al. 8 Ind. 23-24, Griffin et al. vs. Lynch et al. 10 Ind., 217. I have not referred to the pages and sections of our code of practice upon which these decisions are based, for the reason that they are referred to in the cases cited. I, also, do not deem it necessary to refer to the repeated decisions of this court, in which it has held,

as a cardinal principle, the judicial interpretations of the statutory laws of the respective States, by their highest courts of judicature, to be *conclusive*. This court has never inquired whether the decisions of State courts, relative to the statutory law and practice of their respective jurisdictions, have been proper or not, but in that respect has always rigidly adhered to the maxim, *de gustibus nil disputandum*. Now, this court has no power by *mandamus* or otherwise, to compel the Supreme court of Indiana, in a given case, to change or abolish its practice, or to change or review its judicial constructions of its code of procedure. The grounds on which the Supreme Court of Indiana affirmed the decision of the Benton Circuit court are not stated in the record. It seems that a case involving the same question, was before them once before, in a different form, which case was prosecuted and determined under the old practice. The Supreme court of Indiana, therefore, naturally enough say that this case is affirmed for the reasons stated in the former case. That court did not thereby intend to reverse or annul her repeated decisions above quoted, as many of them, rendered long after its decision in this case, fully attest. It is not necessary that the law of Indiana regulating the practice in her courts, or the judicial construction which it has received by her courts, should be in the record. This court judicially takes notice of them. In Pennington vs. Gibson, 16 Howard, 65, this court held that the courts of the United States can and should take notice of the laws and *judicial decisions* of the several States of the Union, and that with respect to them no averment need be made in pleading, which would not be necessary within the respective States. Now, the parties in this case being both citizens of Indiana, there was but one channel through which the case could be brought to this court, and that was the Supreme court of Indiana, which must first hear and determine the same,—and it was incumbent on the plaintiff to present the question to that court, in a mode sanctioned by the laws and practice of that jurisdiction.

II.—*But admitting that the questions argued by the counsel for Verden, in his printed brief, were properly before the court, under the facts stated in the record, as between Hannaniah Hewitt and To pen-e-be, the title of the former under his pre-emption claim and patent, must prevail over that of the latter under the treaty, and location by Douglas, and approval thereof by the President.*

In considering this proposition it is necessary to inquire:

1.—Whether, under a proper construction of the treaty between the United States and the Chiefs and Warriors of the Pottawatamie tribe of Indians, of the 27th of October, 1832, the provision therein, in favor of To-pen-e-be, operated as a reservation, or present grant, or *merely as an agreement to grant, to be thereafter executed by a formal conveyance by patent;*

2.—The effect of the location by Mr. Douglas, and approval thereof by the President, under date of March 29, 1837;

3.—The effect of the report of Mr. Crawford, preferring the claim of Hewitt to that of To-pen-e-be, and approval thereof, March 24, 1836, by Mr. Poinset, then Secretary of War;

4.—The effect of the subsequent action of the President in sanctioning the report of Mr. Crawford, and approval thereof by Mr. Poinset, by issuing to Hewitt his patent, dated August 10, 1841;

5.—Whether Hewitt, when he paid his purchase money and received his patent, did not occupy the condition of an innocent purchaser, as against To-pen-e-be, the title of the latter being at best, but an outstanding equity.

1. The treaty of October 27, 1832, with the Chiefs and Warriors of the Pottawattamie Indians provides, so far as its provisions apply to this case:—"ART. 1—That the Chiefs and Warriors aforesaid cede "their title and interest to lands in the State of Indiana, Illinois, and "territory of Michigan south of Grand River to the U. S.; Art. 2—"From the cession aforesaid the following reservations are made, "(naming them;) Art. 3—The United States *agree to grant* to each "of the following persons the quantity of lands annexed to their "names, *which shall be conveyed to them by patent;* to To-pen-e-be "one section; the foregoing reservations shall be selected under the "direction of the President of the United States after the lands shall "have been surveyed, and the boundaries to correspond with the public surveys."

The counsel for the plaintiff in his printed brief says:—"The last "clause quoted in the treaty, speaks of the lands for these Indians, "as the foregoing reservations. * * * * * It is the last provision, and consequently the controlling one in the treaty." If there be any such a rule for the construction of a treaty or statute, or instrument of writing, it must be one of a very fallible and subordinate character, and when hostile to the clear import of such treaty statute or instrument, as indicated by all its provisions, can be enti-

tled to but little, *if any*, consideration. The alleged rule forcibly suggests the remark made by Baldwin, J., in the case of the Lessee of Ewing vs. Burnet, 11 Peters, 54, in relation to punctuation, "that "the Court would, before resorting to it, take the instrument by its "four corners, in order to ascertain its true meaning." The rule at common law for the construction of a deed was the reverse. "If in "a deed there be two clauses so totally repugnant to each other that "they cannot stand together, the first shall be received and the latter "rejected."—2 Black. Com. 381. This rule, however, was subordinate to the rule "That the construction be made upon the entire "deed, and not merely upon disjointed parts of it, *nam ex antecedentibus et consequentibus fit optima interpretatio*—and therefore that "every part of it be (if possible) made to take effect; and *no word* "but what may operate in some shape or other, *man verba debent intelligi cum effectu, ut res magis valeat quam pereat.*"—2 Black. Com. 380.

When the first three articles of the treaty are considered together, no lurking doubt is left as to what was the intention, in this respect, of the contracting parties. The first article cedes to the United States, absolutely, the district of country in which the fractional quarter section is located. The second article accepts from that cession certain reservations, the location of which are partially defined. By the third article the United States *agrees to grant* to To-pen-e-be and other persons the quantity of lands annexed to their names, *which lands shall be conveyed to them by patent.* Now to give this 3rd article of the treaty the construction insisted upon by opposing counsel, the words *agree to grant* and *which lands shall be conveyed by patent* must be rejected. If the hypothesis of the plaintiff in error be correct the insertion in the treaty of the third article was an act of supererogation. It is not natural to suppose that the United States would have agreed to grant in *futuro*, and convey by patent to To-pen-e-be lands, the title to which, by the very terms of the treaty, never vested in the United States, but were reserved to To-pen-e-be. It is impossible to vest a title to, or interest in, specific lands, unless those lands are in some manner identified. If the lands are not identified, the contract, whatever may be its language, is, *ex necessitate rei*, executory.

Had such a contract been made between private parties, it would not have sustained a bill in chancery for specific performance. It was the particular office of the first clause of the third article of the

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The counsel for the plaintiff in his printed brief says:—"The last "clause quoted in the treaty, speaks of the lands for these Indians, "as the foregoing reservations. * * * * * It is the last pro-"vision, and consequently the controlling one in the treaty." If there be any such a rule for the construction of a treaty or statute, or instrument of writing, it must be one of a very fallible and subordinate character, and when hostile to the clear import of such treaty statute or instrument, as indicated by all its provisions, can be enti-

tled to but little, *if any*, consideration. The alleged rule forcibly suggests the remark made by Baldwin, J., in the case of the Lessee of Ewing vs. Burnet, 11 Peters, 54, in relation to punctuation, "that "the Court would, before resorting to it, take the instrument by its "four corners, in order to ascertain its true meaning." The rule at common law for the construction of a deed was the reverse. "If in "a deed there be two clauses so totally repugnant to each other that "they cannot stand together, the first shall be received and the latter "rejected."—2 Black. Com. 381. This rule, however, was subordinate to the rule "That the construction be made upon the entire "deed, and not merely upon disjointed parts of it, *nam ex antecedentibus et consequentibus fit optima interpretatio*—and therefore that "every part of it be (if possible) made to take effect; and *no word* "but what may operate in some shape or other, *man verba debent intelligi cum effectu, ut res magis valeat quam pereat.*"—2 Black. Com. 380.

When the first three articles of the treaty are considered together, no lurking doubt is left as to what was the intention, in this respect, of the contracting parties. The first article cedes to the United States, absolutely, the district of country in which the fractional quarter section is located. The second article accepts from that cession certain reservations, the location of which are partially defined. By the third article the United States *agrees to grant* to To-pen-e-be and other persons the quantity of lands annexed to their names, *which lands shall be conveyed to them by patent.* Now to give this 3rd article of the treaty the construction insisted upon by opposing counsel, the words *agree to grant* and *which lands shall be conveyed by patent* must be rejected. If the hypothesis of the plaintiff in error be correct the insertion in the treaty of the third article was an act of supererogation. It is not natural to suppose that the United States would have agreed to grant in *futuro*, and convey by patent to To-pen-e-be lands, the title to which, by the very terms of the treaty, never vested in the United States, but were reserved to To-pen-e-be. It is impossible to vest a title to, or interest in, specific lands, unless those lands are in some manner identified. If the lands are not identified, the contract, whatever may be its language, is, *ex necessitate rei*, executory.

Had such a contract been made between private parties, it would not have sustained a bill in chancery for specific performance. It was the particular office of the first clause of the third article of the

treaty, to define the quantity of lands which should be granted to the Indians named in the schedule which follows it, and the mode in which such grants should be made.

The office of the clause which follows the schedule was to designate the person who should select the lands, and the time and manner of such selection. It is a general rule, applicable alike to the construction of a deed treaty, or public statute that a clause framed with a view to a particular, shall not be controlled by a subsequent clause framed with a view to a different object or purpose. Thus a clause in a statute defining a principle of public law, or in a deed, the quantity of estate granted, ordinarily, can not be controlled by a subsequent clause prescribing the mode in which the law shall be enforced, or the title to the estate granted guaranteed. For instance, at common law, a formal deed of conveyance consisted of eight parts, each having a separate office, or purpose, to accomplish. It was the office of the premises to define the estate granted, which the *habendum* clause might qualify or explain, for that was its office, but could not contradict or be repugnant to the estate granted in the premises. 2 Black. Com. 298, 4 Kent's Com. 468, Goodtitle c. d. Dodwell vs. Gibbs, 5 Barn. & Cress. 709. In this case Abbott C. J. says: "On the other hand, if an estate and interest in land be mentioned in the premises, the intention of the parties is shown, and the deed may be effectual without any *habendum*, and if an *habendum* follow, which is repugnant to the premises, * * * * the *habendum* shall be rejected, and the deed stand good upon the premises." In Seymour's case, 10 Co., 419 Thomas & Frazer's ed. it was held that if words of inheritance be wanting in the *premises* and *habendum* parts of a deed a life estate cannot be enlarged into a fee, by the use of those words in the covenant of warranty, for a warranty can not enlarge the estate granted in the premises. Now, this doctrine commends itself to observence by its obvious propriety, and addresses itself, with great force, to the case at bar. In framing the first clause of the third article of the treaty, the attention of the contracting parties was exclusively directed to defining the grants, which the United States thereby obligated herself to make to certain Indians, and the mode in which the grants should be made. The clause of that article which follows the schedule of grants was intended, merely, to designate the person who should select the lands *agreed to be granted*, and the time and mode of making such selection. The use of the word reserva-

tions, in this clause, so far as it refers to the grants, agreed to be made under the third article, is a mere *misnomer*.

2. I proceed to inquire whether the location of Douglas, and the approval thereof by the President, vested in To-pen-e-be, a title either equitable or legal to the lands in controversy. In presenting this question I assume that a proper construction of the treaty of 27th October, 1832, demonstrates that the grants agreed to be made under the third article were not intended to be considered as reservations out of the lands ceded under the first article. The marked difference in the language used in the second and third articles evinces that it occurred, not inadvertently, but from deliberate intention. It can not be pretended that the location by the President vested To-pen-e-be with such title on the ground of contract, for the latter has never brought himself in privity with that act either by express acceptance or possession under it. True, the answer avers that Sumner was in possession of the fractional quarter section in dispute as grantee of To-pen-e-be, but this the reply not only denies, but charges that Sumner took possession of the same under the conveyance by Coleman to Verden. No proof, so far as this question is concerned, was introduced by either party. It appears, however, from the record that although Verden claims that Sumner is in possession, in hostility to him, that the latter kindly became the surety of the former in his appeal to the Supreme Court of Indiana. The third article of the treaty provides that the lands which the United States thereby *agreed to grant* to certain Indians, *should be conveyed to them by patents.* This provision must be constructed to have reference to the equitable, as well as the legal title, and to inhibit the conveyance of either, except in the mode prescribed. Now, as the third article of the treaty omits to describe the lands agreed to be conveyed, it was necessary for the President, before he could execute such conveyance, to select the lands, and such selection when made, was only a preparatory step, essential to the performance of the act, which the treaty provides shall vest title, either equitable or legal. The treaty in question, as between the United States and the Chiefs and Warriors of the Pottawattomie tribe of Indians, was a compact; but as to the President, in his capacity as such, and as a citizen, it was a public law. It is true, as a general principle, that a public officer in executing a statute, must strictly conform to such statute. For instance, in the case at bar, the President had no authority to select the lands agreed to be granted

under the third article of the treaty, until the same had been surveyed, and then was compelled to select the same, so as to conform to the public surveys thereof. Had he acted in disobedience to these provisions his acts would have been void; and it is equally clear that he could not have conveyed the title, either equitable or legal, to the lands agreed to be conveyed under the third article, except in the mode prescribed therein, and there exist obvious reasons why he should have been required to convey in that mode. Protection to the public, as the case at bar forcibly illustrates, required it. I do not question the power of the government by treaty, or legislative enactment, to make a present grant of specific land, without the issuing of a formal patent, but deny that in the case at bar, this has been done. The cases cited by counsel for appellant are not applicable. In the case of the United States vs. Percheman, 7 Peters 51, Percheman made his application to have his title to certain lands in Florida, which had been granted to him by the Spanish Crown, previous to the cession of that country to the United States, under the treaty with Spain, of February 22, 1819, judicially recognized. The grant by Spain to Percheman was made on the 12th of December, 1815, and as this Court held, in entire accordance with the laws which then prevailed in that jurisdiction. In behalf of the United States it was insisted that the authority exercised by the Spanish Government in making the grant to Percheman, was not within the royal order of the king of Spain, and, therefore, that he was not entitled to protection under the eighth article of that treaty which provides that: "All grants of land made before the 24th of January, 1818, by his Catholic Majesty in the territories ceded by his Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, *to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty.*" Now, in that case, this Court held Percheman's title to be valid, not on the ground of any provision in the eighth article of that treaty, but by virtue of his original Spanish grant which the United States had obligated herself, in accordance, with the law of nations, to respect. Marshall C. J., who delivered the opinion of the Court, said: "It "may not be unworthy of remark, that it is very unusual even in cases "of conquest, for the conqueror to do more than to displace the sov- "ereign and assume dominion over the country. The modern usage "of nations, which has become law, would be violated; that sense of "justice, and of right which is acknowledged and felt by the whole

"civilized world, would be outraged if private property should be con-
"fiscated, and private rights annulled. The people change their al-
"legiance; their relation to their ancient sovereign is dissolved; but
"their relations to each other, and their rights of property remain
"undisturbed. If this be the modern rule even in cases of con-
"quest, who can doubt its application to the case of an amicable
"cession of territory! Had Florida changed its sovereign by an
"act containing no stipulation respecting the property of indi-
"viduals, the right of property in all those who became subjects
"or citizens of the new government would have been unaffected by
"the change. It would have remained the same as under the ancient
"sovereign. The language of the second article conforms to this
"general principle. His Catholic Majesty cedes to the United States
"in full property and sovereignty, all the territories which belonged
"to him situated to the eastward of the Mississippi, by the name of
"East and West Florida.' A cession of territory is never understood
"to be a cession of the property belonging to its inhabitants. The
"King cedes that only which belonged to him. Lands he had pre-
"viously granted, were not his to cede. Neither party could so under-
"stand the cession. Neither party could consider itself as attempt-
"ing a wrong individuals, condemned by the practice of the whole
"civilized world. The cession of a territory by its name, from one
"sovereign to another, conveying the compound idea of surrendering
"at the same time the lands and the people who inhabit them, would
"be necessarily understood to pass the sovereignty only, and not to
"interfere with private property. If this could be doubted, the
"doubt would be removed by the particular enumeration which fol-
"follows. 'The adjacent islands dependent on said province, all
"public lots and squares, vacant lands, public edifices, fortifications,
"barracks and other buildings which are not private property, arch-
"ives and documents, which relate directly to the property and sov-
"ereignty of the said provinces, are included in this article. This
"special enumeration could not have been made had the first
"clause of the article been supposed to pass not only the objects
"enumerated, but private property also. The grant of buildings
"could not have been limited by the words 'which are not private
"property,' had private property been included in the cession of the
"territory." The case of Mitchell vs. the United States involved the same question as that of the foregoing case of the United States vs. Perchman. Of a kindred character is the case of the United

States vs. Brooks 10, Howard 442, also cited by counsel for appellant. In that case, in July, 1835, the Chiefs and Warriors of the Caddo tribe of Indians had ceded to the United States a certain district of country. A supplementary article of that treaty, executed on the same day, after reciting that the Caddo Indians had, as early as 1801, granted to one Grappe and his three sons, four leagues of the land ceded, in conformity with the laws of Spain, which then prevailed over that territory, provided that Grappe and his sons should be entitled to the four leagues of land so granted to them. The article also defines the locality of the lands which had been granted to Grappe and his sons, and *thereby* reserved out of the cession to the United States. In that case this Court held that Brooks, who claimed under Grappe and his sons, was entitled to the land in controversy, not under any grant contained in the treaty, but by virtue of the original grant made by the Indians in 1801 to Grappe and his sons.

Another class of cases, referred to by opposing counsel, is clearly distinguishable from the case at bar. I refer to the usage of Congress, in providing for the admission of new States, to make liberal donations of land for the seat of government in each new State, and reserving for the use of common schools therein, of the public lands, the sixteenth section in each Congressional township. These provisions are in the nature of public laws, enacted in pursuance of a well established policy of the General Government, and operate as dedications of the property reserved to a public use or purpose, and can not be assimilated to grants, or agreements to grant, to private persons. A dedication of real estate to public use may be made by parol, and manfested by acts in *pais*. The City of Cincinnati vs. White's Lessee 6 Peters 431.

Leissieur vs. Price, 12 How. 59, belongs to this class of cases. It is worthy of note that in this case, although the act of Congress, the construction of which was involved, authorized the Legislature of Missouri te select the lands donated, it was held by this Court that the title of the State did not become complete until the day on which the Governor notified the Surveyor General of the selection of lands by Commissioners who had been appointed for that purpose. Such notice was necessary to place the parties in privity with the selection. In the case at bar, To-pen-e-be has never acted in privity with the location in his favor, so far as the fractional quarter section of land in dispute is concerned. So far as that tract is concerned he has, to this day, failed to assert any title thereto under that location.

The plaintiff in error seems to rely with confidence upon a decision of this Court in the case of Doe Curtis Mann et al. *v.* Wilson, 23 Howard 457. In this case it appears that the United States, by the same article of the treaty, the construction of which is involved in this case, agreed to grant to the Indian Chief, Pet-chi-co, two sections of land, *to be conveyed to him by patent.*

In February, 1833, Pet-chi-co, by general warrantee deed, conveyed his interest under this treaty to Coquillard and Colerick. Of course by this deed he conveyed no specific lands, for the specific lands to which he was entitled under the treaty, had not yet been designated by the President.

In January, 1837, after the death of Pet-chi-co, a patent was issued to his heirs for two specific sections of land. In 1854, the heirs of Pet-chi-co deeded the two sections of land thus patented to them, to the plaintiffs in error in that case, and the controversy as to paramount title in two sections of land arose between the plaintiffs in error and the assignees of Coquillard and Colerick.

In that case, this Court held that an Indian float was assignable, as other property, and that the patent which issued to Pet-chi-co's heirs inured to the benefit of, and vested the title in, the assignees of their ancestor, (Pet-chi-co.)

No question involved in the case at bar, arose or was discussed in that. The effect of a location by a Government agent, and approval thereef by the President, was not involved in the case.

The other cases cited by opposing counsel are clearly distinguishable from the one under consideration. In each case, the language of the treaty under which the claim was asserted, whether considered with referenc to the particular clause on which the claim was founded, or the relation of that clause to the context of the treaty, necessarily imported a *present grant*, or *reservation* of *specific lands*, and in no one instance does the treaty contain a clause that the lands *granted, reserved or agreed to be granted*, shall be conveyed by a formal patent. This distinction between a grant *de presenti* of *specific lands*, and an agreement to grant a certain quantity of land, without prescribing any locality, was taken by this Court in the case of Gaines et al. *vs.* Nicholson et al., 9 Howard, 361. In that case the appellees had filed a bill in chancery in the Circuit Court U. S., for the southern district of Mississippi, against the appellants, to enjoin proceedings in an action of ejectment, instituted by the appellants to recover possession of the sixteenth section, in township twelve, range eighteen east, in

said State. The appellees claimed the land under an act of Congress providing for the disposal of lands of the United States south of the State of Tennessee, and appropriating the sixteenth section in each township to the use of common schools, unless such section should be held by some third party by a paramount title, in which case it was made the duty of the Secretary of the Treasury to locate another section in such township for the use of common schools. The appellees took possession of the section in dispute in 1834. The premises were situated in the territory formerly belonging to the Choctaw Indians, and which they ceded to the United States by treaty on the 29th September, 1830. By a supplementary article of that treaty, one section of land was allowed to D. W. Wall, to include his then present residence. Wall did not, at the time of the treaty, reside in the territory, and of course the reservation to him could only be regarded as a float. On the 29th August, 1832, Wall assigned all his interest under the treaty to Gaines & Glover, who procured a patent for the section to be issued to them on the 7th of December, 1838, some four years after the school trustees had been in possession. This Court reversed the decree of the Circuit Caurt enjoining the action of ejectment, on the ground that the question involved was properly cognizable at law. In this case the Court, after deciding that in the case of a reservation in an Indian treaty, the Indian holds, strictly speaking, not under the treaty of cession, but under his original title, said: "But the question here is whether the reservation of a right, "not to any particular section or parcel of the territory ceded, but a "right generally * * stands upon the same footing." In Wilcox *vs.* Jackson, 13 Peters 488, this Court said: "We think it unneces- "sary to go into a detailed examination of the various acts of Con- "gress, for the purpose of showing what we consider to be true in "regard to the public lands, that, with the exception of a few cases, "nothing but a patent passes a perfect and consummate title. One "class of cases to be excepted, is where an act of Congress grants "lands, as is sometines done, in words of present grant. It "appears, from the act of 1836, which we have been examining, "*that patents are to issue in pre-emption cases.*" In the case at bar, the treaty provides that the lands thereby agreed to be granted to To-pen-e-be, shall be conveyed by patent, and the maxim *expressio unius alterius est exclusio* applies. In Longlois vs. Coffin, 1 Ind. 446, was involved the following provision in a treaty made in 1837, between the United States and the Miami nation of Indians: "From the ces-

"sion made in the first article of this treaty, there shall be granted to "Peter Longlois one-half section of land to be located at a point on "Wild Cat, where the old trace from Mississineway to Thorntown "crosses the same, to be conveyed to *him by patent from* the Presi- "dent of the United States." In that case Blackford J., who delivered the opinion of the Court, said: "Where a treaty says that the title "to a certain tract of land is thereby vested in a certain individual, "his heirs and assigns, the treaty operates as a grant of the land. "But when it says, as in the present case, that a half section of land "at a specified point, shall be granted to a certain person, his heirs "and assigns, *by a patent from the President of the United States*, the "clause amounts only to a contract that the lands shall be afterwards "properly located by an agent of the Government, and *be conveyed* "*by a patent from the President.* It may be that the General Govern- "ment has not done its duty as to the claim of the complainant, but "with that we have nothing to do. That Government is not a party "to this suit; and if it was, we have no power to enforce the perform- "ance of its contracts or duties." This case contains an able review made from the original papers, of the case of Doe e. d. Godfry vs. Beardsly, 2 McLean's Reports, cited by the counsel for appellant. In the case of Forbes et al. vs. Elam, 2 Peters 314, it was held that the words "shall be ratified and confirmed," in a treaty, are the language of contract, and could only be enforced by the legislative power. Marshall C. J., who delivered the opinion of the Court said: "The "article under consideration, (the eighth article in the treaty with "Spain,) declares that all the grants made by his Catholic Majesty "before the 24th January, 1818, shall be valid to the same extent as "if the ceded territories had remained under his dominion. *It does* "*not say that these grants are hereby confirmed.* Had such been its "language it would have acted directly on the subject, and would have "repealed those acts of Congress which were repugnant to it; but its "language is that these grants shall be ratified and confirmed to the "persons in possession, &c. By whom shall they be ratified and con- "firmed? This seems to be the language of contract; and if it is the "ratification and confirmation which are promised must be the act of "the legislature." This interpretation as to the sufficiency of such language to pass, *proprio vigore*, a perfect title was not retracted in the case of the United States vs. Percheman, 7 Peters, above cited. In this case it appeared that the English copy of that treaty to correspond with the Spanish, in its exact meaning, should have read

"shall *remain ratified* and confirmed." Accordingly Marshall C. J., at page 89, said: "In the case of Foster et al. vs. Elam, 2 Peters "253, this Court considered the words shall be ratified and confirmed, "as importing contract. The Spanish part of the treaty was not then "brought to our view, and we then supposed that there was no vari- "ance between them." It is not easy, however, to reconcile the two cases, when it is considered that in the case of the United States vs. Percheman, the Spanish grant was held valid, independent of the eighth article of the treaty upon a well settled principle of the modern law of nations.

3 & 4. If the above positions are correct, that the treaty did not vest To-pen-e-be with a title in any specific lands, but that the provision therein in his favor, operated as an Indian float, and that the location of that float, and approval thereof by the President, were merely initatory steps, essential to the performance of the act which, *alone*, under the treaty, could vest title, then it follows that the subsequent acts of the President, in approving, through his Secretary of War, the report of Mr. Crawford, recommending the setting aside of the location of To-pen-e-be, and issuing to Hewitt his pre-emption patent, were acts done within the scope of his official authority and are valid. It will be noticed that the treaty confers upon the President untrammeled discretion in making the selections under its third article, and clearly the Courts cannot question the mode in which he has exercised that discretion unless he has been guilty of some flagrant abuse of it. It is not necessary to inquire whether Hewitt, in his application for his patent, brought himself strictly within the laws regulating preemption claims. That question is discussed by Mr. Crawford in his report commenting at page eighteen of the record, to which I refer the Court. The counsel for the appellant is mistaken in supposing that the location in favor of To-pen-e-be has never been set aside if the President had authority to do so. The report of Mr. Crawford was concurred in by Mr. Poinsett, then Secretary of War, on the 24th April, 1839. This, in presumption of law, was the act of the President. In Wilcox vs. Jackson, 13 Peters 498, the Secretary of War having directed a section of land in Illinois to be reserved for military purposes this Court presumed that the act was done by direction of the President, and that by law, it was his act. In that case the Court said: "In many "cases the President acts through the heads of departments." Moreover, the President in the case at bar, by necessary implication con-

curred in the act of the Secretary of War, by issuing to Hewitt his *preemption* patent, dated August 10, 1841. If Mr. Crawford, the President and his Secretary of War be correct, the location in favor of To-pen-e-be, so far as the land in controversy is concerned, was made in the face of a superior inchoate equity in Hewitt. Admitting that Hewitt in taking poossessoin of the lands in controversy in 1833, acted without authority of law he can not be treated as a trespasser *ab initio*, at the inetance of the appellant. The General Government whose province, *alone*, it was to complain has ratified that act by issuing to him his patent as a preemptor. This patent is in the usual form of a pre-emption patent, and is entitled preemption certificate No. 33, 776; record page 5. The record discloses that Douglas in locating a portion of To-pen-e-be's float on the land in question, acted in violation of a positive regulation of the executive department, in selecting lands for Indians, under treaty stipulations. The circular of Mr. Woodbury and approved by President Jackson, record pages 16, 17, had not exclusive reference to lands in the Laporte district, ceded under treaty with the Pottawatomies of January 21, 1833. They were intended to indicate the executive policy not only in that, but in all similar cases. The President in setting aside the location of To-pen-e-be, and issuing to Hewitt his preemption patent acted not only minsterially, but judicially, in relation to a matter over which he had untrammeled discretion, and exclusive jurisdiction, and the propriety of his acts can not be questioned in this collateral manner.

5. It is clear that under the treaty and location To-pen-e-be could have acquired no title or interest in the land in controversy except a naked equity. The President could not invest him with the legal title except in the mode prescribed by the treaty. Hewitt when he paid the purchase money and received his patent became an innocent purchaser, unless he had notice of To pen-e-be's equity. The *onus* was upon the appellant to prove such notice. The record is silent upon this subject. The record does not disclose as opposing counsel asserts, that when Hewitt applied in 1838, to purchase "that he was "refused because an Indian float had been placed upon the land in "question." His claim was refused by the register at Crawfordsville, Indiana, "for the reason that the township plats of the land, on "which his claim was located, had not been received at his office;" record page 12.

III. *Admitting, that as against the patentee Hewitt, To-pen-e-be*

has a prior equity of which the former had notice when he purchased, Coleman's purchase, in the name of Banta, was made in the absence of such notice, from a person who had a regular and, connected chain of title, having its origin in a patent from the President.

It will not be questioned that where a person purchases real estate, in good faith, and for a valuable consideration, and receives the legal title, he is entitled to hold it as against a secret outstanding equity of which he had no notice. Under our registration laws he is entitled to hold it even as against a prior unrecorded legal title. So, also, a purchaser in good faith, under a decree of a Court of competent jurisdiction, is entitled to hold though the decree under which he purchased be afterwards reversed. These principles especially apply to the case of a holder of such secret equity, or unrecorded deed, who, for many years, has stood by and acquiesced in the title of such innocent purchaser. Coleman is clearly within the protection which these principles extend to an innocent purchaser. The U. States conveyed the lands in dispute to Hannaniah Hewitt, August 10, 1841, record page 5; who on the 23d October, 1841, for the consideration of two hundred and seventy dollars, conveyed the same to Lorenzo D. Hewitt—record, page 23, and the latter on the 9th June, 1843, in consideration of one thousand dollars, conveyed the same to Banta in trust for Coleman—record, page 25. Here is a regular chain of title from the General Government to Banta, each subsequent enfeoffee paying an advanced consideration. Although fifteen years intervened between the issuing of the patent to Hewitt, and the filing of the complaint in this case to foreclose the mortgage executed by Verden to Coleman, it does not appear that To-pen-e-be during that period asserted any claim under the location of Mr. Douglas, and then it was asserted in favor of one who is a mere trespasser or else entered under the sale by Coleman to Verden. It is fair to presume that the provision in the treaty requiring the President to convey to To-pen-e-be by patent was inserted with reference to the registration laws prevailing in the Western States, and for the protection of the public.

IV. *Sumner entered into possession of the land in controversy under the sale by Coleman to Verden, and in collusion with the latter, and Verden cannot dispute Coleman's title, until he surrenders that possession, unless forcibly evicted.*

As a general rule, a tenant cannot dispute the title of his landlord under a lease from whom he has entered. He must first be evicted or voluntarily abandon his possession. The same rule applies as between vendor and vendee. Pomeroy vs. Burnett, 8 Blackford (Ind.), 142, was assumpsit upon a promissory note by *Burnett*, for the use of *Thompson*, administrator of *Thompson*, deceased, against Pomeroy. The defendant below plead four pleas, and among others, a plea which states that the note in the declaration mentioned, was given for the purchase money of a certain tract of land described in the plea; that at the time of the execution of the note, a deed by the payee thereof, with covenant, was executed for said land to the defendant that one of the covenants in the deed was that the land conveyed was free from incumbrance; that at and before the execution of said deed there was upon said premises an outstanding mortgage to *Charles Grani* for three hundred dollars, which was more than the land was worth; and that the mortgage was due and unpaid when the suit was commenced. In the decision of this case relative to this plea, the Supreme Court of Indiana said: "The fourth plea constitutes no "defence to the action, and should have been demurred to. It is "true that the mortgage is an incumbrance, and that its existence "constituted an immediate breach of the covenant, that the premises "conveyed were free from incumbrance, *but until eviction*, or pay-"ment, by the vendee of the incumbrance, but nominal damages ac-"crue to him on account thereof, and no defence arises to the recove-"ry of the purchase money."

I have not examined the numerous cases cited by the Counsel for the appellant to this point, for the reason that the rule in Indiana controls. Henderson vs. Griffin, 5 Peters 151.

V. *This Court has no appellate jurisdiction in this case. The decision of the Supreme Court of Indiana is final.*

In presenting this question, it is assumed that the treaty vested To-pen-e-be with no title, legal or equitable, to any specific lands, and that the provision therein, in his favor is, what in popular parlance as an Indian float. It is also assumed that the location by Douglas, and approval by the President, not having been communicated, or assented to by To-pen-e-be, did not vest such title, and that such title could be conferred only in the mode prescribed by statute —*by a formal conveyance by patent.* Until such communication and

assent, To-pen-e-be was not in privity with or affected by the location or approval, and, of course, can claim no rights under them. At most the location and approval by the President, only conferred upon To-pen-e-be an outstanding equity which he has long since abandoned, by acquiescing in the conveyance to Hewitt. The only question, therefore, presented by the record is, whether the acts of the President in setting aside, with his consent as implied from his long silence and acquiescence, To-pen-e-be's location and issuing to Hewitt his patent were valid acts, performed within the sphere of his legal authority. The Supreme Court of Indiana has decided that they were. The question is not therefore re-examinable here, on error to that Court.

To give this Court such appellate jurisdiction, by express provision of the 25th section of the Judiciary act, it was necessary that the Supreme Court of Indiana, should have decided against their validity.

For these reasons I submit that the judgment of the Supreme Court of Indiana, should be affirmed.

Z. BAIRD, *of Counsel for Appellee.*

APPENDIX.

The complaint to foreclose—, record pp. 1—4.

Answer thereto—, record pp. 4—10.

Reply to answer—, record pp. 10—22.

Demur to the reply overruled and no exception taken—record p. 22.

Submission of the case in the Benton Circuit Court and decree rendered—, record pp. 22—3.

No motion, either verbal or written, made for a new trial—, record p. 23.

Bill of exceptions, setting forth the evidence given on the trial in the Benton Circuit Court—, record pp. 23—26.

Assignment of errors in the Supreme Court of Indiana—, record p. 27.

Decision of the Supreme Court of Indiana—, record p. 27.

Hewitt was in possession as a pre-emptor under the law of 1834, and had made valuable improvements, and previous to the expiration of that law made his application and proofs to the register of the land office at Crawfordsville to be permitted to enter the land in controversy as a pre-emptor, which application and proofs were rejected, not from any default of his, but because the township plats of the land in which his claim was located had not been received at that office—, record pp. 12, 13, 14, 18, 19, 20, 21.

Location by Mr. Douglas of To-pen-e-be's float on the land in controversy while in possession of Hewitt, under his pre-emption claim, and approval thereof by the President in March 1837—, record pp. 7—8.

Report of Mr. Crawford, preferring the claim of Hewitt to that of To-pen-e-be, and recommending that the location in favor of the latter be set aside—record pp. 18—21.

Approval of that report by Mr. Poinset, then Secretary of War, April 24, 1839—, record p. 21.

Douglas in locating To-pen-e-be's float on the land in controversy acted in disobedience to a settled policy of the Executive department—record pp. 16—7.

The patent issued to Hewitt, in pursuance of the recommendation of Mr. Crawford, and approval by Mr. Poinset—record p. 5.

Deed from Hewitt, the patentee to Lorenzo D. Hewitt, dated October 23, 1841—record pp. 23—4.

Deed from Lorenzo D. Hewitt to Banta in trust for Coleman, dated June 9, 1843—record p. 25.

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